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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-74-64

MARIE ABATE, *et al.*,

Petitioners,

vs.

PITTSBURGH PLATE GLASS COMPANY, *et al.*,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Statement of the Case 3

Reasons for Granting the Writ 9

A. The Settlement Is Inadequate 9

B. The Court Below Erred in Denying Petitioners the Opportunity to Opt Out of the Settlement 18

Conclusion 23

Appendix—

Opinion of the Court of Appeals 1a

Opinion of the Court of Appeals on denial of motion for rehearing and for rehearing *en banc* 11a

Judgment and Mandate of the Court of Appeals 12a

Opinion of the District Court 14a

Rule 23, Federal Rules of Civil Procedure 20a

Title VII of the Civil Rights Act of 1964, 42 United States Code, 2000e, *et seq.* 24a

Certificate of Service 27a

PAGE

Table of Cases

Air Line Stewards and Stewardesses Assn., Local 550 v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973), *cert. denied sub nom Air Line Stewards and Stewardesses Assn. Local 550 v. Zipes*, —— U.S. —— (1974) 9, 22

Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) 14, 17

Eisen v. Jacqueline & Carlisle, —— U.S. —— (1974) 21

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 13

Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973) 17

Hansberry v. Lee, 311 U.S. 32 (1940) 20

Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) 21

Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974) 17, 20

Jurinko v. Wiegand Co., 477 F.2d 1038 (3rd Cir. 1973) 14, 16

Kober v. Westinghouse Electric Corp., 480 F.2d 240 (3rd Cir. 1973) 16, 18

LeBlanc v. Southern Bell Telephone & Telegraph Company, 460 F.2d 1228 (5th Cir. 1972), *cert. denied*, 409 U.S. 990 (1972) 17, 18

Manning v. General Motors Corp., 466 F.2d 812 (6th Cir. 1972) 17, 18

PAGE

Mickel v. *South Carolina State Employment Service*, 377 F.2d 239 (4th Cir. 1967), *cert. denied*, 389 U.S. 877 (1967) 16
Moody v. *Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973) 17

Newman v. *Piggie Park Enterprises*, 390 U.S. 400 (1968) 17
Newman v. *Stein*, 464 F.2d 689 (2nd Cir. 1972) 19
Neweirth v. *Allen*, —— F. Supp. —— (S.D.N.Y. 1964), *aff'd* 338 F.2d. (2nd Cir. 1964) 19

Pettway v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) 17
Protective Committee for Independent Stockholders of TMT Ferry Inc. v. *Anderson*, 390 U.S. 414 (1968) 9, 19

Robinson v. *P. Lorrilard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972) 14, 16
Rosen v. *Public Service Electric and Gas Co.*, 477 F.2d 90 (3rd Cir. 1973) 16
Rosenfeld v. *Southern Pacific Company*, 293 F.Supp. 1219 (C.D. Cal. 1968) *aff'd in part*, 444 F.2d 1219 (9th Cir. 1971) 14, 15, 17

United States v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2nd Cir. 1971) 14

Weeks v. *Southern Bell Telephone & Telegraph Company*, 408 F.2d 228 (5th Cir. 1969) 14
Williamson v. *Bethlehem Steel Corp.*, 468 F.2d 1201 2nd Cir. 1972) 9

Young v. *Katz*, 447 F.2d 431 (5th Cir. 1971) 19

PAGE

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment to the United States Constitution 18, 21

42 United States Code, Section 2000a-3(b) 17

42 United States Code, Section 2000e, *et seq.* .....*passim*

Rule 23, Federal Rules of Civil Procedure .....*passim*

In the

Supreme Court of the United States

October Term, 1974

No. 74-.....

Marie Abate, *et al.*,

Petitioners,

vs.

Pittsburgh Plate Glass Company, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review the judgment entered in the above-entitled case on April 4, 1974, rehearing of which was denied May 7, 1974.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 494 F.2d 799 (1974) and set forth in the appendix, *infra*, at pp. 1a ff. The order denying rehearing and rehearing *en banc* is as yet unreported; it is set forth in the appendix, *infra*, at pp. 11-a ff. The opinion of the United States District Court for the Western District of Pennsylvania is reported at 59 F.R.D. 616 (June

12, 1972) and is set forth in the appendix, *infra*, at pp. 14-a ff.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 4, 1974 and motion for rehearing was denied on May 7, 1974.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 United States Code, Section 1254(1), review of a judgment of the United States Court of Appeals for the Third Circuit having been requested.

Question Presented

1. Did the court below err in upholding the district court order, approving the compromise and settlement of all issues in this class action claiming sex discrimination under Title VII of the Civil Rights Act of 1964 (42 United States Code, § 2000e, *et seq.*) where:

A. One fifth of the members of the class and one quarter of those with timely charges filed with the Equal Employment Opportunity Commission objected to the terms of the settlement; and

B. Only a small percent of one of three elements of relief prayed for was realized under the terms of the settlement; and

C. The only opportunity class members had to exclude themselves from further participation in the action came immediately prior to trial and made no mention of the fact of or terms of settlement discussions.

Statutory Provisions Involved

1. This case involves the provisions of Rule 23, Federal Rules of Civil Procedure, fully set forth in the appendix, *infra*, at p. 20-a ff.

2. This case also involves various provisions of Title VII of the Civil Rights Act of 1964, 42 United States Code, § 2000e, *et seq.*, relevant portions of which are fully set forth in the appendix, *infra* at p. 24a ff.

Statement

Petitioners here constitute approximately one fifth of the original class of plaintiffs in this action, who sought to object to the settlement of this action when first proposed in the district court in January of 1973.[1]

The facts underlying this action for sex discrimination under Title VII of the Civil Rights Act of 1964 (hereafter "Title VII") actually arose much earlier in the 1940's. At that time, respondent Pittsburgh Plate Glass (hereafter "PPG") was, as it now is, engaged in the fabrication of glass products at the Creighton, Pennsylvania plant. Beginning in 1943 each of the plaintiffs sought and obtained work at the Creighton plant. As hourly employees of PPG's Creighton plant, each of the plaintiffs was also represented by the respondent union here, in a series of collective bargaining agreements extending to the present time.

By the early 1950's, PPG had found it necessary to begin laying off employees in their order of seniority. The class

[1] During the course of these proceedings the exact number of plaintiffs objecting to the settlement has varied. The percentages have remained the same, and therefore do not significantly alter the percentages here.

of plaintiffs in the present action, with seniority dates ranging from August 12, 1943 to August 2, 1951, were accordingly affected by these lay-offs, together with numerous of their male counterparts.

The late 1950's and early 1960's saw increased production at the PPG Creighton plant. Accordingly furloughed employees were recalled in order of seniority, until by 1966 each furloughed male employee had been recalled to the Creighton plant. However, none of the original 452 women who comprised the original class of plaintiffs in this action were recalled. And when, in 1966, PPG began to hire new employees at the Creighton plant, all of those hired were male, while the 452 furloughed women remained unemployed.[2]

Contemporaneously with the recall process affecting male employees, PPG also sought in the early 1960's to alter the seniority provisions in the collective bargaining agreement which guaranteed employees on layoff "perpetual" seniority. Thus, in 1962 PPG sought to alter its seniority system by adding a provision to the collective bargaining agreement which would automatically terminate anyone on lay-off for more than two years; a similar five year cut-off provision was proposed in 1964. Each of these proposals would have operated to terminate men, as well as women then on lay-off. Both proposals were rejected by the unions. Finally, on August 14, 1968, PPG and the unions agreed to a "seniority cut-off" in the collective bargaining agreement then being negotiated. That agreement ended the former "perpetual seniority" system and caused the immediate discharge of any person not actively employed with the company within the five years preceding the date of the agreement. The direct result of this agree-

[2] PPG hired its last woman into a bargaining unit position in 1951. Appendix, vol. II at p. 43 in the court below, No. 73-1697.

ment was the termination of the 452 women employees who form the class of plaintiffs in this action. No men were terminated as a result of the agreement.[3]

Notification of the terminations caused by the new seniority system came by letters dated September 26, 1968. Upon receipt thereof, some 51 women filed timely charges of sex discrimination with the Equal Employment Opportunity Commission (hereafter "EEOC").[4] The EEOC began investigation of the charges, but ultimately refused to reach a determination on the issue of whether PPG and the unions had violated Title VII's command against sex discrimination. Instead, the EEOC notified each of the charging parties of her right to sue in federal court.[5]

This action was timely begun after receipt of a right to sue letter on August 4, 1970. Plaintiffs sought full relief for the sex discrimination practiced by the company and the unions. Both defendants immediately moved to dismiss the suit on grounds that plaintiffs had failed to file timely charges of discrimination with the EEOC.[6] This motion

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[3] During this period, women employees constituted between 22 and 25% of the union's local membership. Appendix, vol. II at p. 11 in the court below, No. 73-1697.

[4] Each such charge was properly lodged with the EEOC within 90 days of the respective charging party's receipt of her letter of termination.

[5] The EEOC's failure to reach a determination in the present set of charges was the result of a conflict occasioned by the Commission's position in a second set of sex discrimination charges filed by active PPG employees. These fifteen charges, filed in 1966, claimed discrimination in the company's policy of limiting jobs to one sex. These charges were ultimately resolved in an EEOC conciliation executed on November 14, 1968. This agreement opened some, but not all, formerly male jobs. Those jobs which continued to be restricted to men only were agreed by all parties to be jobs that only men could adequately perform. Naturally, none of the present class of plaintiffs was present during these proceedings.

[6] 42 United States Code, 2000e-5(d) required, prior to its 1972 amendment, that charges of discrimination be lodged with the EEOC within 90 days of the date of the act complained of.

was denied by order of the district court entered April 21, 1971. On July 15, 1971, following initiation of pretrial discovery, the action was certified as a class action under Rule 23(b)(2), with notice waived. That order was later amended in 1972, when the action was again certified for class treatment, this time under Rule 23(b)(3). The required notice for a 23(b)(3) class was given to each of the 452 class members for the first time on July 31, 1972. That notice contained the proposed date of trial and informed class members that "[u]nless you express a desire in writing to this Court to be *excluded* from this action . . . the judgment will include you as a member of the class and you will be bound by it. If you desire to be *included* in this class action, you *do not* have to reply to this Notice[7] (original emphasis). The notice also included a statement that all class members were then being represented by the plaintiffs' lawyers, but that any class member might enter an appearance with separate counsel.

The trial of this matter proceeded in a bifurcated fashion, with liability and damages designated for hearings in that order. Plaintiffs began and completed the presentation of the merits of their case on the issue of liability in the first day of trial, held November 27, 1972. At the conclusion of this hearing, a second notice to class members was ordered. This second notice was identical in content to the previous August, 1972 notice.

The proceedings re-convened on December 21, 1972 with the defendant company's presentation of its case on the issue of liability. After a Christmas recess, the matter was rescheduled for January 8, 1973. At the beginning of this hearing, however, all counsel announced that they had reached an agreement in full and final settlement of this case. After counsel had outlined briefly the elements of

[7] Appendix, vol. I, at p. 16 in the court below, No. 73-1697.

the settlement, numerous class members, including each of the three named plaintiffs, requested and was allowed to testify to her objections to the content of the settlement proposal.[8] No class member spoke in favor of the settlement at this hearing.

Additional notification to the class membership was ordered next, in order to explain the terms of the settlement and give notice that the court had reviewed the settlement preliminarily and intended to approve it, "subject to hearing the views of individual class members". A hearing was then set for January 29, 1973, for this purpose.

At this hearing, eighty-eight class members appeared to testify against the settlement, without benefit of counsel. Their objections to the compromise fell into three categories:

> (a) The settlement offered inadequate compensation in the form of back pay, providing only 15% of back wages actually lost and resulting from the defendants' sex discrimination from 1966 to date;
>
> (b) The settlement offered no pension credits for the years plaintiffs would have worked but for unlawful sex discrimination on the part of the defendants;
>
> (c) The settlement denied the plaintiffs the right of reinstatement, irrespective of individual dates of seniority.[9]

A common thread throughout this testimony was the surprise with which the plaintiffs met the settlement. Sev-

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[8] This testimony appears in Appendix, vol. III at p. 183 ff. and 195 ff. in the court below, No. 73-1697.

[9] This testimony appears at pp. 18 ff. in the transcript of the hearing of January 29, 1973 which forms a part of the record in the court below, No. 73-1697.

eral of those testifying as to their objections noted that no previous mention of settlement had ever been made.[10] In response to these objections, the district court ordered a recess of three months, within which the objectors might obtain their own counsel and submit briefs. Argument on the question of the settlement was held on June 4, 1973 and the settlement as originally proposed, adopted and approved by order of the district entered June 12, 1973. That opinion and judgment of the district court was affirmed by the Third Circuit Court of Appeals in an opinion entered April 4, 1974. Motion for rehearing or for rehearing *en banc* was denied on May 7, 1974.

The Court of Appeals based its decision on the fact that it found approval of the settlement by the district court not an "abuse of discretion" since it was "fair and reasonable". This finding of reasonableness was premised on the following weaknesses claimed to exist in plaintiffs' case:

> (a) the seniority cut-off was for a valid business purpose and of "questionable discriminatory effect";
>
> (b) plaintiffs "appear[ed] not to have met" the requirement of filing a timely EEOC charge;
>
> (c) there was a strong likelihood that plaintiffs would properly be denied any back pay had they gone to trial;

The Court of Appeals also rejected the view of plaintiff-objectors, as well as of the EEOC as *amicus curiae*, that a majority of class members might not coerce the minority into settlement. In adopting this position, the lower court rejected pertinent decisions of other circuits in which the course of private litigants' actions were held unimpaired by actions taken by the attorney general in companion liti-

[10] Transcript of January 29, 1973 hearing at pp. 28 and 43, in the court below, No. 73-1697.

gation. See generally *Williamson* v. *Bethlehem Steel Corp.*, 468 F.2d 1201 (2nd Cir. 1972), *Air Line Stewards* v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973).

And finally the Court of Appeals rejected the view, suggested by plaintiffs, that a conflict between class members made necessary the use of sub-classes; as a proper subclass, plaintiff-objectors, petitioners here, might not be compelled to accept a settlement, unfavorable when viewed in terms of their aims for the litigation.

Reasons for Granting the Writ

This case raises a question of great importance to the increasing number of litigants seeking judicial redress from discrimination under Title VII of the Civil Rights Act of 1964: May a private litigant be compelled to settle his cause of action on terms he does not favor, merely because the majority of his fellow class members wish to accept such a settlement? This question has never before precisely been answered by this Court. Nevertheless, strong authority exists in analogous areas to prevent the compromise of an individual's rights in a settlement against his will. See *Protective Committee for Independent Stockholders of TMT Ferry, Inc.* v. *Anderson*, 390 U.S. 414 (1968).

A. *The Settlement Is Inadequate*

The settlement under dispute here involves a total amount of $1,151,824.00 in final settlement of the claims of 371 class members, each claiming back wages, pension rights and reinstatement as a result of unlawful sex discrimination under Title VII of the Civil Rights Act of 1964.[11]

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[11] This amount was allocated as follows: back pay to 371 class members—$931,724.00; attorneys' fees—$201,250.00; additional amounts to named plaintiffs—$17,500.00; expenses of the litigation —$1,350.00. See opinion of the district court, *infra*, at p. 14a ff.

As a "lump sum" dollar amount, the settlement figure is impressive. But its fairness and adequacy can only be judged when the actual amounts received by individual plaintiffs are compared with their monetary losses during the period from 1966 to a point of settlement in January of 1973. From 1966 to 1968, respondent PPG hired a total of 380 new male employees at the Creighton plant, while plaintiffs here remained on continuous lay-off. As a result, each individual plaintiff lost employment and wages, which when compared with the amounts allocated to each under the settlement, establish the percent of recovery range from a high of 26% to a low of 1%.[12] Taken as an average, the class received but 15% of the actual back wages lost as a result of the defendants' sex discrimination.

The fairness of the settlement does not rest on the dollar amount of back pay offered each class member alone. The settlement almost completely omits any reference to pension rights for class members, and completely excludes the right to reinstatement. These two omissions are the basis of petitioners' objections to the settlement here as in both courts below.

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[12] Lost wages for each of the plaintiffs has been estimated in the following manner: for each year a minimum level of earnings at PPG was calculated, based upon the lowest hourly wage stated in the applicable collective bargaining agreement. This amount, which excluded over-time, shift differentials, piece rate and all other upward variations of the basic wage, was then reduced by an amount representing "interim earnings", as required by 42 United States Code, §2000e-5(g). These interim earnings were calculated based upon the applicable minimum wage for the years involved, 1966-1973, as set forth in 29 United States Code, §203. Based on this model, each class member lost back wages amounting to $19,047.40 for the period. This figure was then compared to actual amounts allocated to individual class members, using both a high figure of $4,899.00 (Susan Halupe) and a low figure of $261.28 (Margaret Voytecky).

As women whose average age was between 45 and 65[13], petitioners saw their pension rights as the most important element of relief sought by this law suit. In order to obtain these pension rights, petitioners were ready to return to work. And as a minimum, they sought a settlement that would credit their pensions with the years they could have worked at PPG, but for the unlawful sex discrimination practiced by the defendants.

Without benefit of counsel, eighty-seven women, including each of the three named plaintiffs, testified against the settlement in the first district court hearing of January 29, 1973. And each listed pension rights as her main reason for opposing the compromise offer. One of the named plaintiffs, Elvira Kissel, expressed the groups dissatisfaction in the following words:

> "WITNESS KISSEL: As a '44 girl, January 3, I lost seven years seniority towards pension—average wage per year 7,000 times seven is 49,000. I would be in there working today. Seven years Blue Cross, that is about $540 a year; that is about 3,780 for the seven years. About 200 a year sub-pay that they pay times seven; that is 1,400. I lost vacation pay at ten percent of gross wages. I lost cost of living that they pay, sixteen cents per hour worked; I lost severance privileges. That is a total of 57,180 plus lost in seven years.
>
> "I never expected to get it all. I never expected to get half of it. But at least a third of it, we deserve.
>
> "Had they called us women and gave us the opportunity to work, these women would have their pension available to them, all this money they lost, benefits, fringe benefits. Your Honor, money isn't everything

[13] Appendix, vol. II, at p. 139 in the court below, No. 73-1697.

> but the pension is all us women have to look forward to. That is all we have to look forward to. Three months [pension credit], to me, is very, very little for what they are offering in this total package" [14]

The courts below sought to justify the limited relief afforded by the settlement,—15% of but one of three elements of relief prayed,—by resort to the rule that approval of a class action settlement requires a settlement to be fair, reasonable and adequate when judged by the strengths and weaknesses of the parties' respective cases. Leaving aside for the moment the question of how this standard, first articulated and applied in the field of antitrust and corporate reoragnization, applies to a Title VII action where individual civil rights are involved, it is apparent that plaintiffs' case displayed no such weakness as to justify so minimal a settlement award.

At the announcement of the settlement, plaintiffs had completed persentation of their case on liability. The issue of damages, essentially individual in nature, had, however, been reserved. Thus the district court had before it facts establishing to a certainty that from 1951 forward, PPG had hired and recalled male employees only. During this period *not one* new woman was hired and only a handful were recalled, leaving 452 women employees of PPG on lay-off. Having completed the process of recall for its male employees, PPG and the unions sought to terminate those women still on lay-off by revising the "perpetual seniority system" operative in the plant since the first collective bargaining agreement in 1943.

The court below recognized that given the foregoing history of *prima facie* sex discrimination, the defendant company was faced with the burden of justifying its seniority

[14] Appendix, vol II at p. 193, ff in the court below, No. 74-1697.

cut-off decision.[15] Two such justifications are possible and both were considered and improperly applied by the lower court. The "business necessity" defense was first articulated by this Court in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971). The Court of Appeals suggests that because "the termination provision was instituted to promote PPG's 'business purpose' of securing a work force of balanced age" and because the provision was of "questionable discriminatory effect", the district court might properly conclude no sex discrimination present.[16]

This rationale conflicts with both this court's decision in *Griggs*, as well as with every other major decision of courts of appeal applying the "business necessity" doctrine since *Griggs*. The fact that PPG's decision against recall and hire of its women employees on lay-off was based on valid business reasons and made in good faith does *not* establish "business necessity. This Court said in *Griggs:*

> Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. 401 U.S. at 432.

What the court below may have meant with its "questionable discriminatory effect" language is unclear. It is difficult to understand how failure to recall women employees, all the while recalling men steadily and even hiring new men for the first time, could be anything but sex discrimination.

In certain cases the business purpose may over-ride the fact of discrimination, but that seems an unlikely possibility here. "Business necessity, as first articulated by this Court in *Griggs*, and later applied by the courts of

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[15] See opinion of the court below, *infra*, at p. 4a ff.

[16] See opinion of the court below, *infra*, at p. 5a ff.

appeal, connotes something far beyond convenience. It has been described as an "irresistable demand", *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652 (2nd Cir. 1971) and as something essential to the safe and efficient operation of the employer's business, *Robinson* v. *P. Lorillard Corp.*, 444 F. 2d 791, *cert. denied* 406 U.S. 906 (1972). But here the business purpose underlying the company's termination of "perpetual seniority" has been expressed as a need to have a work force of varied age distribution.[17] That this does not rise to the level of an "irresistible demand" is seen by the fact that twice previously the same proposal was waived by PPG during collective bargaining.

The second possible defense to plaintiffs' *prima facie* case of sex discrimination is the "bona fide occupational qualification" defense embodied in Section 703(e) of the Act. The court below discusses this defense cursorily and suggests that by allegations alone, PPG has presented adequate grounds to justify the acceptance of a minimal settlement.[18]

The lower court thus appears to have misconstrued the "BFOQ" defense. This exception to sex discrimination has been narrowly applied by the courts of appeal. Unless "all or substantially all women are unable to perform a given job, disqualification of any woman, from such job category must proceed on an individual basis. See *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228 (5th Cir. 1969); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969); *Jurinko* v. *Wiegand*, 477 F. 2d 1038 (3rd Cir. 1973); and *Rosenfeld* v. *Southern Pacific Co.*, 444 F. 2d 1219 (9th Cir. 1971).

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[17] See the Brief of the Defendant-Appellee PPG in the court below at p. 11; the transcript of the proceedings in the district court held December 21, 1972 at p. 67 ff; and the opinion of the court below at p. 5a.

[18] Opinion of the lower court, *infra*, at p. 14a.

Stated differently, once a policy such as PPG's has been shown to discriminate, application of the "BFOQ" standard will, in the majority of cases, be a matter of individual proof of damages. Women employees, like their male counterparts, must be given an opportunity to compete. As the court in *Rosenfeld, supra,* noted:

> The premise of Title VII . . . is that women are now to be on equal footing with men. [citation omitted] The footing is not equal if a male employee may be appointed to a particular position on a showing that he is physically qualified, but a female employee is denied an opportunity to demonstrate personal physical qualification. Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon a showing or individual incapacity. 444 F. 2d at 1225.

In evaluating the strength of the plaintiffs' case here, the "BFOQ" defense is useless. Neither court below had before it any evidence on the individual abilities of the plaintiffs, since the issue of damages had not been reached. There could have been no basis to discount the strength of plaintiffs' claim by reliance on the "BFOQ" defense. Indeed, had there been proof indicating that some of the plaintiffs would not in 1966 or would not now be able to perform the jobs at PPG's Creighton plant, it would have been error to discount the entire case on that basis.

The court below concludes its weighing of the merits of plaintiffs' claims with a reference to two procedural defenses available to the defendants. The first concerns timely filing of the plaintiffs' several charges of discrimination with the Equal Employment Opportunity Commission, as required by 42 United States Code, § 2000e-5(e). This issue was immediately raised by both defendants in

the district court on motion to dismiss. That court found timely filing and ruled for the plaintiffs in April of 1971. This ruling was never challenged and no appeal was taken from it, yet the court of appeals concludes that "plaintiffs appear not to have met that [filing] prerequisite."[19] In support of this view it cites only *Mickel* v. *South Carolina State Employment Service*, 377 F.2d 239 (4th Cir. 1967), *cert. denied* 389 U.S. 877 (1967), a case which stands for the proposition that a charge must be filed with the EEOC prior to commencing court action under Title VII, an issue never before in question here. The significance of *Mickel* to the plaintiffs' case here is thus unclear.

Finally, the court of appeals suggests justification for the small percent of back pay offered by the settlement on the grounds that back pay awards are "discretionary" and "it is not clear that failure to award such relief [back pay] here, were plaintiffs successful, would constitute an abuse of discretion". The court concludes that "[i]n light of their defenses, we believe there is a strong likelihood that PPG and the Union would not have been held liable to plaintiffs for back pay".[20] The only authority cited for this conclusion is *Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240 (3rd Cir. 1973), a case denying back pay where sex discrimination resulted from the direct application of state protective legislation.

The decisions of the panel below is thus contrary to decisions by other panels of the Third Circuit, as well as decisions of the Fourth, Fifth, Sixth and Seventh Circuit Courts of Appeal.[21] Authority of this Court in an analo-

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[19] Opinion of the court below, *infra*, at p. 6a.

[20] Opinion of the court below, *infra*, at p. 6a.

[21] Those decisions are: *Jurinko* v. *Wiegand*, 477 F.2d 1038 (3rd Cir. 1973) and *Rosen* v. *Public Service Electric and Gas Co.*, 477 F.2d 90 (3rd Cir. 1973); *Robinson* v. *P. Lorillard Corp.*, *supra*,

gous area supports this majorirty view that, absent exceptional circumstances, back pay should be awarded where discrimination has been established. In *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968), where awards of attorneys' fees under Title II of the Civil Rights Act of 1964, 42 United States Code, § 2000a-3(b), were considered, this Court defined "discretion":

> It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. 390 U.S. at 402.

The only exception to awards of back pay has occurred in the narrow area where sex discrimination suits have arisen in the context of conflicting state protective legislation. *See, e.g., Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Manning* v. *General Motors Corp.*, 466 F.2d 812 (6th Cir. 1972); and *LeBlanc* v. *Southern Bell Telephone & Telegraph Company*, 460 F.2d 1228 (5th Cir. 1972), *cert. denied*, 409 U.S. 990 (1972). Each of these cases involved sex discrimination suits where conflicting state protective legislation existed—not at issue here. Absent such state protective legislation, a majority of circuit courts have held that back pay is the rule, not the exception, once discrimination is established.

In the area of back pay, then, "special circumstances" are narrowly construed. To date, no authority exists for the proposition that anything *but* state protective legislation conflicting with sex discrimination qualifies for treat-

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and *Moody* v. *Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) and *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); and *Bowe* v. *Colgate Palmolive*, 416 F.2d 711 (7th Cir. 1969).

ment under the exception.[22] *Kober* v. *Westinghouse Electric Corp.*, *supra*, stands for this proposition and provides no authority for weakening the case of plaintiffs here, since no protective legislation is involved.

The most that can be said in support of the lower court's reliance on *Kober* is that it erroneously attempts to extend the "special circumstances" exception to action by the EEOC. Aside from the obvious due process considerations raised, no authority supports the lower court's view that an EEOC conciliation, of which present plaintiffs had neither knowledge nor control, may be now used to reduce their valid claims for back pay under Title VII.

B. *The Court Below Erred in Denying Petitioners the Opportunity to Opt Out of the Settlement*

Petitioners argued in the court below, as in the district court, that the settlement in this action need not bind all of the plaintiffs or none of them. They suggested in the lower courts, as here, that the procedures embodied in Rule 23, Federal Rules of Civil Procedure, do not contemplate such an "all or nothing" result in class actions arising under Rule 23(b)(3). Considerations of due process under the Fifth Amendment to the United States Constitution suggest that unless private Title VII litigants are free to exercise control of their law suits, Rule 23 may be subject to constitutional attack.

Both Courts below viewed approval of the instant settlement as essentially a matter of majority rule.[23] In so doing,

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[22] For cases applying this exception, *see, e.g. Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Manning* v. *General Motors Corp.*, 466 F.2d 812 (6th Cir. 1972); and *LeBlanc* v. *Southern Bell Telephone & Telegraph Company*, 460 F.2d 1228 (5th Cir. 1972), *cert. denied*, 409 U.S. 990 (1972).

[23] At the district court hearing on the settlement's adequacy, the district court judge commented: "I have one question: Should

they attempted to apply an improper standard of review which originated in areas of corporate litigation, such as stockholder derivative actions, patent infringement suits and antitrust litigation. In areas such as these, where corporate health and activity are involved, majority approval, coupled with court review under Rule 23(e), Federal Rules of Civil Procedure,[24] insures absent class members of whether "there is any fraud or collusion in arriving at the compromise and . . . whether the compromise if fair, adequate and reasonable . . .". *Young* v. *Katz*, 447 F. 2d 431, 433 (5th Cir. 1971). In such situations, the court stands as a guardian for those class members not present. And in such cases, the rights involved are common and joint in the focus of the litigation, typically corporate well-being. See *Young* v. *Katz*, *supra*, at 432, applying the "best interests of the corporation" test as stated in *Newmirth* v. *Allen*, —— F.Supp. —— (S.D.N.Y. 1964), *aff'd*. 338 F. 2d 2 (2nd Cir. 1964).

The standards of review of class settlements involving individual interests rather than litigation on behalf of corporate funds are not identical *See, Newman* v. *Stein*, 464 F. 2d 689 464 F. 2d 689, 692 fn. 6 (2nd Cir. 1972).

This distinction was noted by this Court in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414 (1968), a proceeding

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I or should I not approve this settlement that has been stated to the Court; should 22 percent overrule 78 percent?" Appendix, vol. II at p. 253 in the court below, No. 73-1697.

[24] Rule 23(e) reads: "Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

As amended February 28, 1966, eff. July 1, 1966.

for reorganization of a corporation under Chapter X of the Bankruptcy Act. There it was stated:

> Moreover, this Court has held that a plan of reorganization which is unfair to some persons may not be approved by the court even though the vast majority of creditors have approved it. 390 U.S. 435.

Typical of the differences between cases arising under a common corporate question, and those raising both common and individual rights, are Title VII actions such as that of petitioners here, arising under Rule 23 (b)(3).[25] Insofar as the class members sought to litigate broad questions of liability for unlawful sex discrimination, the interests of the class were identical. At the point of settlement, however, individual factual differences predominate. This is so because a settlement must ultimately be negotiated in terms of back pay, which is in turn essentially an individual matter. See, *Johnson* v. *Goodyear Tire and Rubber Co., supra*, where the Fifth Circuit noted the need for "separate determinations on an individual basis as to who is entitled to recovery and the amount of such recovery", 491 F.2d at 1375. At this point it is likely that the weakest individual claims will press for a favorable settlement on the basis of the strengths of other class members' claims. This Court previously discussed this conflict in *Hansbury* v. *Lee*, 311 U.S. 32 (1940). It is stated there:

> "It is one thing to say that some members of a class may represent other members in a litigation where

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[25] Rule 23(b)(3) in relevant part states: "Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: * * * (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . ."

> the sole and common interest of the class in litigation, is either to assert a common right or to challenge an asserted obligation. [citations omitted] *It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted may be deemed adequately to represent any others of the class in litigating their interests in either alternative.* Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process required. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far." [citations omitted] 311 U.S. at 444. (emphasis added).

As a solution to this problem, petitioners suggested to both courts below that they be reconstituted as a "subclass" under Rule 23(c)(4)(B). As a subclass they might then have been allowed to "opt out" of the settlement proposal while going forward with the litigation on their own right.[26] Although such a procedure finds support in this Court's decision in *Eisen* v. *Carlisle & Jacquelin*, —— U.S. —— (1974), as well as that of *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122 (5th Cir. 1969), it was rejected by the courts below as outside the ambit of Rule 23(c).

We believe this conclusion to be error and in direct conflict with recent authority in the Seventh Circuit. Issues nearly identical to those raised here were decided along

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[26] As has been noted, petitioners here represented 25% of those originally filing EEOC charges in this action. As such numbers of them might have maintained her own action independent of the present suit. *Supra*, at p. 5.

the lines petitioners suggest in *Air Line Stewards and Stewardesses Assn., Local 550* v. *American Airlines, Inc.*, 400 F. 2d 636 (7th Cir. 1973), *cert. denied sub nom Air Line Stewards and Stewardesses Assn. Local 550* v. *Zipes*, —— U.S. —— (1974). The similarities in the actions are striking. Both are class actions raising claims of sex discrimination under Title VII. In both the class subdivided along the lines of the relief sought; in both counsel for plaintiffs negotiated a settlement without consulting the wishes of individual class members during the process; and in both a meaningful opportunity to "opt out" was lacking.[27]

Yet the results obtained by petitioners here differ markedly from those of the Seventh Circuit in *Air Lines Stewards*. That case was remanded with directions, first, that the settlement be set aside to allow for the formation of appropriate subclasses, each properly represented; and, second, so that class members might enjoy a meaningful opportunity to opt out of the litigation, if they desired. If class actions are to continue as a successful device for litigating multiple claims, the conflict between these decisions must be resolved in favor of the *Air Lines Stewards* approach. Any other decision will cause the prudent class litigants to "opt out" at the earliest opportunity as the only way to maintain a semblence of control over their lawsuits. Such a result violates the fundamental rationale behind Rule 23 as well as the principles of efficient court administration. This writ of certiorari should be granted to resolve this conflict between the Circuits and prevent the misapplication of Rule 23.

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[27] The "opt out" notice to petitioners here made no mention of the then on-going settlement negotiations and failed to suggest that plaintiffs would be bound by the results of a court approved settlement, as well as a judgment.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1697

SARAH M. BRYAN, ANNA MAE DEMEO and ELVIRA KISSEL,
on behalf of themselves and all others similarly situated

v.

PITTSBURGH PLATE GLASS COMPANY,

(PPG Industries, Inc.)

and

UNITED GLASS AND CERAMIC WORKERS OF
NORTH AMERICA, AFL-CIO

and

UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA,
CREIGHTON LOCAL NO. 12,

(D. C. Civil No. 70-920)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Argued January 15, 1974

Before:

SEITZ, *Chief Judge*, KALODNER and
ALDISERT, *Circuit Judges*.

OPINION OF THE COURT

(Filed April 4, 1974)

Opinion of Court of Appeals

SEITZ, *Chief Judge:*

Appeal is taken here, pursuant to 28 U.S.C. § 1291 (1970), from an order of the district court for the Western District of Pennsylvania approving settlement of a class suit and dismissing the complaint with prejudice. The suit was filed on behalf of women presently or formerly employed at the Pittsburgh Plate Glass Company's Creighton plant. Plaintiffs allege that defendants Pittsburgh Plate Glass Company ("PPG") and the United Glass and Ceramic Workers ("the Union") engaged in sex discrimination violating Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.* (1970).

The factual setting for this suit is not complex. Both before and after the effective date of the Civil Rights Act of 1964, PPG classified jobs at its Creighton plant as available to men only or to women only; no job was open to both men and women. Because men and women were not eligible for the same jobs, separate seniority lists were kept. In the 1940's and 1950's, PPG laid off a great number of its Creighton employees. These employees, however, continued to accrue seniority while on lay-off since the bargaining agreement between PPG and the Union contained no termination provision.

When PPG's Creighton operation experienced a brief upsurge in business, in 1966 and 1967, men were recalled from lay-off and new employees were hired to fill male-only positions. No women were recalled, although had the seniority lists been merged, many women would have been senior to most of the recalled male employees. Complaints filed with the Equal Employment Opportunity Commission (EEOC) resulted in a conciliation agreement pursuant to which PPG merged seniority lists and opened certain jobs

to both men and women. Other jobs remained open to only one sex.

In 1969, PPG and the Union negotiated an agreement covering Creighton employees by which employment rights of employees laid off for more than five years were terminated. This agreement immediately terminated the rights of 452 women, but no men. Sex discrimination charges again were filed with EEOC. EEOC made no final

The appellants, however, contend that the defendants' determination, but issued a "right-to-sue" letter to the complainants. Three women who had filed charges with the EEOC brought suit against PPG and the Union.

The district court found maintenance of a class action proper under Rule 23(b)(2) and (b)(3), and the class was defined as the 452 women initially terminated by the cut-off provision negotiated by defendants. Notice was given to the class, and a number of class members opted out of this litigation. After plaintiffs had completed presentation of their case and defendants had presented a substantial part of theirs, agreement on a settlement was reached. Class members were notified of the proposed settlement's terms and were given the opportunity to voice, and brief, objections. Subsequently, the district court approved the settlement, and 82 objecting plaintiffs appealed.

I.

The district court has considerable discretion in determining whether a settlement is fair and reasonable, and its determination will be reversed only for abuse of discretion. Appellants, objecting plaintiffs, contend that the district judge abused his discretion in approving the settlement here. The first argument advanced to support this contention is that the plaintiffs' case was relatively strong as compared to defendants' and, therefore, that it was clearly

not reasonable to grant plaintiffs a very small percentage of claimed back pay.

Consideration of the merits of the case is one step in determining the likely rewards the class would secure, if any, from prosecuting the litigation to a conclusion. *United Founders Life Insurance Co.* v. *Consumers National Life Insurance Co.*, 447 F.2d 647, 655-56; (7th Cir. 1972); cf. *Protective Committee* v. *Anderson*, 390 U.S. 414, 424-25 (1968). The court, of course, need only evaluate the probable outcome of the litigation and is not required to weigh and decide each contention; further, the probable result at trial must be balanced against the probable costs, in both time and money, of continued litigation. *Id.* With these caveats in mind, we turn to a consideration of the plaintiffs' and defendants' cases.

Plaintiffs would seem to have made out a prima facie case of violation of Title VII's prohibition on sex discrimination. See 42 U.S.C. § 2000e-2(a) & (e) (1970); cf. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). They have shown a past discriminatory policy and an action having immediate discriminatory impact on employment rights. Because plaintiffs probably would be found to have established a prima facie case of sex discrimination, defendants would bear the burden of justifying their discriminatory conduct. *Muniz* v. *Beto*, 434 F.2d 697, 700 (5th Cir. 1970).

Defendants assert that negotiation of the seniority cutoff provision was not discriminatory. They point out that the provision, although intially terminating rights only of women employees, thereafter terminated the employment rights of numerous male employees. Indeed, continued adherence to this provision is likely to terminate the rights of more men than women. Defendants insist that the ter-

mination provision was instituted to promote PPG's "business purpose" of securing a work force of balanced age. Coupled with a questionable discriminatory effect, this business purpose might well lead the district court to conclude that the negotiation of the seniority cut-off did not constitute discrimination on the basis of sex and, hence, was not an unlawful employment practice.[1] Cf. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 796-97 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1972).

The appellants, however, contend that the defendants' action becomes discriminatory when viewed in light of PPG's established system of job-classification by sex. Assuming that the legal theory underlying this contention is correct, we note that PPG claims that its job classifications were proper, and to support its claim, PPG has made allegations that appear to satisfy some of the disparate tests for ascertaining a bona fide occupational qualification.[2] See *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969); *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev., 1109, 1177-81 (1971). As an additional defense, the defendants assert that plaintiffs' suit is barred by failure to file charges with the EEOC within ninety days of the alleged unlawful practice, here

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[1] Defendants also contend that, even if discriminatory, the termination provision is not unlawful because it was required by PPG as a "business necessity." We do not find consideration of this defense necessary.

[2] PPG claims that it can prove that all or substantially all women would be incapable of the repetitive lifting of heavy loads of glass (which, PPG asserts, is a fragile and dangerous matter) required for formerly male-only jobs and that no practicable test exists to isolate individual women, if any, who may be capable of performing such jobs. We note, however, that in 1973 PPG abandoned all job classification by sex.

negotiation and adoption of the seniority cut-off provision.[3] Timely filing with the EEOC has been held a jurisdictional prerequisite to maintenance of a Title VII suit, e.g., *Mickel* v. *South Carolina State Employment Service*, 377 F.2d 239, 242 (4th Cir. 1967), and plaintiffs appear not to have met that prerequisite.

Two final points concerning the probable outcome of trial here are made by defendants. First, while appellants complain that plaintiffs are receiving a small percent of their back pay claim, plaintiffs have failed to indicate how they would substantiate their claim. Second, defendants correctly note that award of back pay is discretionary, and it is not clear that failure to award such relief here, were plaintiffs successful, would constitute an abuse of discretion. See *Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240, 247-50 (3d Cir. 1973). In light of their defenses, we believe there is a strong likelihood that PPG and the Union would not have been held liable to plaintiffs for back pay. We, therefore, reject appellants' contention that, given the likely trial result, the district court abused its discretion in approving the settlement for a low proportion of plaintiffs' asserted loss.

II.

Appellants contend, however, that the district court abused its discretion in approving as fair and reasonable the particular settlement proposed here when more than twenty percent of the class plaintiffs objected. While the proportion of the class opposed to a settlement is one

[3] The time limit for filing charges with the EEOC has been expanded, since the commencement of this suit, from ninety to one hundred eighty days from occurrence of the alleged unlawful practice. See 42 U.S.C. §2000e-5(e) (Supp. II 1972). We assume that this change does not alter the prerequisites for plaintiffs' suit.

factor to be considered in assessing its fairness, see *C. Wright & A. Miller, Federal Practice and Procedure Civil* § 1797 and cases cited n.42 (1972), a settlement is not unfair or unreasonable simply because a large number of class members oppose it. The drafters of Rule 23 chose as a means of protecting the class the requirement that the district court approve the settlement. They did not require rejection of a settlement on objection of a given part of the class.

Rather than asserting that the number of objectors alone makes approval of the settlement improper, appellants argue that the number of objectors coupled with the nature of the right class members seek to vindicate make approval an abuse of discretion. The right to be free from discrimination is a personal right. See *Robinson* v. *Lorillard Corp., supra* at 799. Appellants argue that litigants should not be forced to abandon personal, as opposed to joint, rights without a judicial decision on the merits. The present Rule 23, however, makes no distinction for settlement purposes between class suits formerly called "true" class actions, where the class shares a joint right or liability, and class suits formerly denominated "hybrid" or "spurious," where rights or liabilities are several. Fed. R. Civ. P. 23(c), 23.1, 23.2; see *J. Moore*, 3B *Moore's Federal Practice* Para. 23.80[1] & [2] (2d ed. 1974). Thus, if it is improper to approve a settlement compelling appellants to abandon their claims against defendants, this impropriety must spring from the nature not of personal rights in general but of the specific rights asserted by the class here.

Appellants, as well as the EEOC speaking as amicus curiae, note that actions prosecuted by the Attorney General under Title VII cannot bind the discriminatee as res judicata or collateral estoppel. *Williamson* v. *Bethlehem*

Steel Corp., 468 F.2d 1201, 1203-04 (2d Cir. 1972). Since, they argue, class representatives in a Title VII action function as "private attorneys general," such representatives should not be more able to bind unconsenting plaintiffs than the Attorney General. This analogy fails on two grounds. First, the class representatives do not bind dissenting class members; the district court, not the class representatives, must determine that the settlement is fair and reasonable. Second, class suits serve different ends than do public suits. The Attorney General's prosecution of a suit is governed by desire to achieve broad public goals and the need to harmonize public policies that may be in conflict; practical considerations, such as where limited public resources can be concentrated most effectively, may dictate conduct of a suit inimical to the immediate interests of the discriminatee, who presumably seeks full satisfaction of his individual claim regardless of the effect on other cases.

Unlike suit by the Attorney General or even by a "private attorney," who sue to protect public rights, the class action seeks to vindicate the rights of specific individuals, the class members; and unlike the public action, for a class action to be maintained the class representatives must be members of the class, have claims typical of the class and adequately represent the interests of absent class members. Fed. R. Civ. P. 23(a). Further, this action having been classed as a 23(b)(3), as well as (b)(2), class suit, the class members were given the opportunity to opt out of the litigation. It does not seem anomalous to allow a court approved class settlement, but not a suit by the Attorney General, to compromise a discriminatee's Title VII claim.

III.

Although the district court did not abuse its discretion in finding the settlement fair and reasonable, appellants contend that the judgment of the district court must, nonetheless, be reversed. Appellants argue that the district court erred in defining the class broadly for all purposes when the class was clearly divisible into two sub-classes seeking different relief. The more senior class members are presumed by appellants to be interested in securing only back pay, while appellants desire reinstatement as well.

Where some ascertainable characteristic shared by only some members of a class causes them to seek relief not desired by the remaining members, it may be improper to treat the class as unitary. A pertinent illustration is offered by the Seventh Circuit's decision in *Air Line Stewards & Stewardesses Association* v. *American Airlines, Inc.*, Nos. 72-1335, -1336, -1339 & -1503 (7th Cir. December 21, 1973), although the court there focused on whether a proper class representative had been selected. The suit in *Air Line Stewards*, which challenged American Airlines' policy of discharging stewardesses who became pregnant, was originally filed on behalf of presently employed stewardesses who did or might desire to become pregnant and on behalf of stewardesses whose employment was terminated due to pregnancy. Obviously, those still employed by American could have an interest only in revocation of the airline's discharge-for-pregnancy policy, while former employees could assert claims for back pay and reinstatement as well.

No such distinction appears here. All class members are former PPG employees terminated at the same time for the same reason by the same action. No difference among

the plaintiffs appeared until some objected to the settlement; and we cannot assume that objection to the settlement sprang from differences generic to one identifiable group of plaintiffs. We, therefore, reject appellants' contention that the district court erred in refusing to divide the class into sub-classes.

Finally, appellants challenge the sufficiency of the district court's statement of its reasons for approving the settlement and dismissing the suit. It is essential in cases such as this that the district court set forth the reasoning supporting its conclusions in sufficient detail to make meaningful review possible; use of "mere boilerplate" language will not suffice. *Protective Committee* v. *Anderson*, *supra* at 434. Here the district court's opinion meets that requirement: it catalogues the parties' contentions, indicates the court's view of their strengths, and notes additionally the substantial delays likely in ascertaining appropriate back pay, should plaintiffs win such relief. To require a fuller statement of the court's views would turn a decision on approval of a proposed settlement into a determination on the merits in all but name.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Opinion of Court of Appeals Denying Motion for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No.73-1697

SARAH M. BRYAN, *et al.*, on behalf of themselves and all others similarly situated,

v.

PITTSBURGH PLATE GLASS COMPANY, *et al.*,
OBJECTING PLAINTIFFS, MARIE ABATE, *et al.*,

Appellants.

SUR PETITION FOR REHEARING

Present:

SEITZ, *Chief Judge*,
KALODNER, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER,
WEISS and GARTH, *Circuit Judges*.

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Illegible
Judge

Dated: May 7, 1974

Judgment and Mandate

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1697

[SAME TITLE]

(D. C. Civil No. 70-920)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present:

SEITZ, *Chief Judge*
and KALODNER and ALDISERT, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed June 12, 1973, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:
THOMAS P. QUINN
Clerk

Judgment and Mandate

April 4, 1974

Certified as a true copy and issued in lieu
of a formal mandate on May 15, 1974.

Test: THOMAS P. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

Opinion and Order of District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 70-920

RECEIVED

JUN 13 1973

SARAH M. BRYAN, ANNA MAE DEMEO and ELVIRA KISSEL, on behalf of themselves and all others similarly situated,

v.

PITTSBURGH PLATE GLASS COMPANY (PPG Industries, Inc.), and UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO, and UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, CREIGHTON LOCAL NO. 12.

This is a class action which alleges sex discrimination in hiring and employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §2000(e), *et seq.* Essentially plaintiffs claim that defendants failed to recall them to work for jobs at Pittsburgh Plate Glass Company's Creighton plant and wrongfully terminated the seniority rights of the female employees who are members of the class.

The original class was composed of 452 members. Notice of the action was sent to the members, and an opportunity to remain or withdraw from the class was provided, as well as an opportunity to obtain personal counsel. After these options were exercised, the class was determined to be comprised of 371 members.

After the filing of defendants' Answers and an extensive period of discovery, the Court commenced a non-jury trial of this proceeding on October 10, 1972, as to liability. After the completion of plaintiffs' case and the presentation of considerable evidence and testimony by defendant, counsel for the parties agreed upon a settlement. Under the terms of this settlement, a fund of $931,724 is to be divided among class members on the basis of the number of months in which each class member worked at the Creighton Plant. This formula has the effect of allocating a proportionately larger share of the settlement fund to those more senior class members who, if the lawsuit were partially or wholly successful, would have been entitled to a proportionately larger back pay award. The settlement also extends pension benefits to 76 class members.

The settlement also provides special awards in the aggregate amount of $17,500 to those members of the plaintiff class who were most active in the prosecution of this case and who devoted substantial time and expense on behalf of the class.

Finally, the settlement provides for the payment of counsel fees in the amount of $175,000 to Balzarini, Walsh, Conway & Maurizi, counsel for the plaintiff class, and $26,250 to Neely & Voss, referring counsel, and $1,350 for out-of-pocket legal expenses of plaintiff's counsel. Out of these sums, counsel for plaintiffs will reimburse class members for amounts advanced by them for expenses of the suit.

On January 8, 1973, this Court directed that a notice be sent to all members of the plaintiff class, describing the proposed settlement and informing class members of their right to appeal at a hearing on January 29, 1973, to state objections to the proposed settlement. Such notice was

sent, and a hearing was conducted on January 29, 1973, at which time all persons objecting to the settlement had an opportunity to be heard. This Court then ordered that the question of the propriety of the proposed settlement be briefed by the parties, including counsel for the objecting class members and the Equal Employment Opportunity Commission.

On the basis of the record considered as a whole, including the pleadings, interrogatories and answers thereto, pretrial stipulations of the parties, the evidence and testimony presented at the trial, the testimony at the settlement hearing and the briefs submitted by the parties, it is this Court's conclusion that this settlement is a fair and adequate compromise of plaintiffs' claim and takes proper account of the uncertainties and risks of continued litigation.

In this regard it is well to note that this case involves many complex issues which make liability questionable and subject to conjecture. Just a brief recitation and summary of some of these issues illustrates this complexity. For example, the termination of employment by defendants may well have been based on sound business objectives or bona fide occupational qualifications rather than discrimination; plaintiffs' claims even if valid might be subject to the statute of limitations for failure to timely file an appropriate claim with the Equal Employment Opportunities Commission; and the EEOC, whose expertise must be given great deference by the Court, has determined that the August 14, 1968, agreement between defendant union and defendant company terminating the seniority of the employees laid off more than five years was a bona fide seniority agreement entered without any intention to discriminate against plaintiff class.

Beyond the complexity of the issues presented, the Court must conclude that this settlement is fair, reasonable, and just because of the great deal of time which could be consumed if the action were taken to its final conclusion. Assuming all the legal issues related to liability were resolved favorably to the class, the rights of each member of the class would have to be evaluated separately. This by its very nature would require the services of a special master and could well consume four or five years.

In view of all these factors, the Court deems it appropriate to grant approval to the proposed settlement herein above set forth.

An appropriate Order is entered.

ORDER

And Now, this 12 day of June, 1973, it is hereby Ordered:

1. Defendant PPG Industries, Inc., shall deliver to the law firm of Balzarini, Walsh, Conway & Maurizi, counsel for the plaintiff class, no later than October 1, 1973, separate checks payable to the order of each member of the plaintiff class in the amount indicated in Appendix A to this Order.

2. Defendants will provide those members of plaintiff class listed in Appendix B hereto with a pension as provided in the pension agreement covering employees of the Creighton Plant of PPG Industries, Inc. Those class members with at least 9-9/12ths but less than 10 years of credited service under the pension agreement covering the Creighton Plant will be credited with sufficient additional service to equal ten years, the number of years required

to entitle an employee to a pension. Each class member with 10 or more years of credited service under the pension agreement, including those who will become vested by reason of the foregoing provision, will upon making application on or after attaining age 65 receive a monthly pension equal to the years of credited service multiplied by the normal retirement rate in effect on the date application is filed. If any such class member makes application for a pension between age 60 and age 65, the pension benefit will be actuarially reduced in accordance with the terms of the pension agreement.

3. Defendant PPG Industries, Inc., shall deliver to the law firm of Balzarini, Walsh, Conway & Maurizi, counsel for plaintiff class, no later than October 1, 1973, separate checks in the amounts and payable to the order of those class members indicated in Appendix C hereto, which class members actively pursued this litigation and devoted substantial time and expense on behalf of the plaintiff class.

4. Within a reasonable time after receipt by counsel for the plaintiff class of the settlement awards of individual class members, said counsel shall forward the same to each class member, together with a copy of this Order.

5. Upon delivery of the settlement checks to Balzarini, Walsh, Conway & Maurizi, all defendants shall be released of and from any and all obligations, claims, demands, damages and causes of action which any class member may have arising out of or by reason of her employment with PPG Industries, Inc., or her relationship with defendant Unions and more particularly of and from the claims, disputes and demands which are alleged in and gave rise to

this suit. Defendant PPG Industries, Inc., shall refer to this Order on the checks to be distributed to class members.

6. Defendant PPG Industries, Inc., shall pay $176,350 to Balzarini, Walsh, Conway & Maurizi for counsel fees and expenses and $26,250 to the law firm of Neely & Voss as counsel fees. Balzarini, Walsh, Conway & Maurizi shall reimburse class members for any amounts advanced for the expenses of this litigation.

7. The claims of all class members alleged in and arising out of the complaint in this case are hereby dismissed with prejudice.

WALLACE S. GOURLEY
Senior District Judge

Rule 23, Federal Rules of Civil Procedure

"Rule 23. Class Actions

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"(1) the prosecution of separate actions by or against individual members of the class would create a risk of

"(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

"(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

Rule 23, Federal Rules of Civil Procedure

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

"(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

"(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

"(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a

specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

"(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

"(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

"(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all

of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

"(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

Title VII of the Civil Rights Act of 1964, 42 United States Code, §2000e, *et seq.* (Excerpted)

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. [As amended March 24, 1972, P. L. 92-261, Sec. 8.]

• • •

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and

(2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

• • •

Sec. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or pro-

ceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

Certificate of Service

I, ELIZABETH R. RINDSKOPF, certify that I am a member of the bar of this Court and that I am of counsel for petitioners Marie Abate, et al., in the above styled and that I have this day served counsel for all respondents addressed as below by first class air mail, sufficient postage prepaid, by depositing copies of same with the United States Mail:

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This day of August, 1974.

.....

Elizabeth R. Rindskopf
Of Counsel

FILED
AUG 30 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-64

MARIE ABATE, *et al.*,
Petitioners,

vs.

PITTSBURGH PLATE GLASS COMPANY, *et al.*,
Respondents.

REPLY BRIEF OF PLAINTIFFS-APPELLEES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX.

PAGE

Counter-Statement of the Case 1

Argument 3

I. Conflict in Decisions 3

II. "Opt Out" Opportunity 6

Conclusion 7

CASES CITED.

Air Line Stewards v. American Airlines, Inc., 490 F2d 636 (7th Circuit, 1973), *cert. denied sub-nom.*, Air Line Stewards v. Zipes, U.S. (1974) (Airline cases") 1, 3, 4, 5

RULE.

Rule 23 ..... 1, 2, 3, 6

STATUTE.

Civil Rights Act of 1964 4

IN THE

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Counter-Statement of the Case

Plaintiffs submit that only three assertions contained in the objecting plaintiffs' Petition require comment, *i.e.*,

(a) That the Third Circuit Court of Appeals decision in this case is "in direct conflict" with the case of *Air Line Stewards v. American Airlines, Inc.*, 490 F2d 636 (7th Circuit, 1973), *cert. denied sub-nom., Air Line Stewards v. Zipes*, ____ U.S. ____ (1974) ("*Airline* cases");

(b) That Rule 23 affords the objecting plaintiffs an opportunity to opt out of the court-approved *settlement* through the creation and maintenance of sub-classes; and

(c) That the notice to the class was insufficient in that it "made no mention of their on-going settlement negotiations and failed to suggest that plaintiffs would be bound by the results of a court approved settlement, as well as a judgment".[1]

From a factual standpoint, discussion of these matters requires only that the Court be appraised of the fact that there were no "on-going settlement negotiations" at the time that the notices to the class were sent on or about July 31, 1972 and November 28, 1972 and that any assertion to the contrary has no basis in fact.[2]

The record itself lends no support to, and the undisputed facts absolutely contradicted, this assertion. As the objecting plaintiffs themselves state in their Petition, plaintiffs presented the liability aspects of their case in November, 1972 and defendant, Pittsburgh Plate Glass Company, began presentation of its liability defense on December 21, 1972. Subsequent to December 21, 1972, defendant, Pittsburgh Plate Glass Company, made a settlement offer to plaintiffs' counsel. Plaintiffs' counsel in turn convened a meeting of the class members on January 3, 1973 to discuss the terms of the settlement offer. A substantial majority of members of the class who attended this meeting voted to accept the settlement offer. On the basis of this vote in favor of accepting the offer, plaintiffs' counsel in his capacity as attorney for the class recommended that the District Court approve the settlement.

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[1] Petition, Page 22, Footnote 27.

[2] These notices were sent to every member of the class pursuant to Rule 23(c)(2). The form of the notice complied with the requirements of sub-paragraphs (A), (B) and (C) of said Rule.

ARGUMENT

The Third Circuit Court of Appeals properly entered judgment affirming the action of the District Court in approving the settlement. Further, there is no conflict in decisions rendered by the federal appellate courts or any important or substantial question of federal law which would merit review by the Supreme Court.

I. Conflict in Decisions

There is absolutely no merit in objecting plaintiffs' contention that the decision in the *Airline* cases is in conflict with the decision in this case.

In this case there is no legal or factual bases for dividing this class into sub-classes. All the factual and legal issues involved in this case are common to all members of the class. All members of the class (a) were employed by the same corporate defendant at the same plant, (b) were subject to the same collective bargaining agreement between corporate defendant and union defendant, (c) were subjected to the same illegal and discriminatory employment practices of corporate defendant and union defendant and (d) under the provisions of the approved settlement were entitled to the same benefits determined upon the bases of actual work experience as the controlling factor. The only differentiating element between plaintiff-appellees and objecting plaintiffs is that the former group is satisfied with the settlement and the latter group is dissatisfied with the settlement.

No citation of authority is necessary to support the proposition that such a difference between the groups is not legally sufficient to require the creation and maintenance of sub-classes under Rule 23 (c) (4). Additional irrefutable evidence of the fact there is no appropriate subclass in this case is shown by the fact that there are

plaintiff-appellees who accept the settlement proposal in every seniority category in which there are objecting plaintiffs. Objecting plaintiffs' assertion that this class has, like the classes in the *Airline* cases, "subdivided along the lines of the relief sought"[3] is simply not true.

On the other hand, in the *Airline* cases there were two clearly defined sub-classes with conflicting interests under the settlement approved by the District Court. A group of stewardesses filed suit against American Airlines charging that its practice of permanently discharging them because of pregnancy constituted unlawful sex discrimination; they purported to represent all persons similarly situated who had been permanently discharged for the same reason since the effective date of the Civil Rights Act of 1964. On the same day, the stewardesses' union filed a similar suit against TWA. Subsequent to the filing of these suits, the airlines agreed to terminate prospectively the illegal practice. Under the terms of a court-approved settlement, in which the union purported to represent plaintiffs in both actions, the discharged stewardesses were to be rehired with their seniority at the date of termination, but only to fill vacancies as they occurred rather than being reinstated with full back pay and interim seniority in place of stewardesses then employed with junior seniority. The Circuit Court found that these two groups had adverse, conflicting interests and that the union was not an adequate representative of the discharged stewardesses.

Plaintiffs' counsel in the *Airline* cases, Mr. Feldman, was also general counsel for the union. He undertook to represent both groups of stewardesses, *i.e.*, those stewardesses whose employment had been terminated and those stewardesses who were then actively employed by the

[3] Petition, Page 22.

airlines, in the preparation and settlement of the lawsuits. Feldman later conceded that these two groups had conflicting interests; thus neither group was an adequate representative for the other group. In negotiating the settlement proposal, Feldman consulted none of the plaintiffs or class members respecting the terms of the settlement. After the settlement proposal was formulated, the Court determined that a class action could be maintained and notice of a hearing on the terms of the proposal was sent to all class members. *At no time* were any class members given the opportunity to opt out of the action, even though the District Court held that the settlement proposal was binding on all members of the class.

Of course, the facts in this case in no way resemble the facts in the *Airline* cases and the decisions in them in no way conflict with one another. The class members in this case were given two clear, separate and distinct opportunities to opt out of the action. Such opportunities came approximately four (4) months apart, giving the members more than sufficient time to ponder and reflect on their failure to opt out of the class action the first time they were given the opportunity. Objecting plaintiffs thus must be held to have made two affirmative decisions to be included in the class by their failure to make known their desire to be excluded from the class. Further, not only were the class members in this case informed and appraised of the terms of the settlement proposal, but plaintiffs' counsel did not proceed to seek approval of the settlement proposal until a majority of the class members who voted so directed him.

Thus, there is no basis for asserting a conflict in the decisions of the Third Circuit Court in this case and the Seventh Circuit Court in the *Airline* cases.

II. "Opt Out" Opportunity

Rule 23 (c) (2) (B) requires that the class determination notice advise each member of the class that "the *judgment*, whether favorable or not, will include all members who do not request exclusion; . . ." The two notices sent to the class members in July and November, 1972 contained this language as required by the Rule. There is no requirement under Rule 23 or the case law interpreting the same that the words "*or settlement*" be inserted after the word "judgment" in subsection (c) (2) (B), for the insertion of such words would be superfluous in view of fact that any settlement must be approved by the District Court. All class members in this case were given two opportunities to opt out of the class action and, indeed, of the original 453 class members, 81 did, in fact, opt out. Objecting plaintiffs should not be given a third opportunity to opt out when Rule 23 only mandates one.

Objecting plaintiffs would have this Court rewrite Rule 23 (c) (2) (B) to enable class members to opt out of class action litigation at anytime they saw fit. If class members were able to do so, there would be no settlement in class action litigation because any class member dissatisfied with the terms of a proposal settlement could force the parties to try the case to a final judgment. If by a settlement a defendant could not terminate once and for all his liability and the expenditure of funds in defense of a class action, there would be no reason to settle with any class member.

With these facts in mind, it becomes clear that objecting plaintiffs have made an erroneous statement of the issue involved in this case. They would have the Court believe the issue to be:

> May a private litigant be compelled to settle his cause of action on terms he does not favor, merely because

> the majority of his fellow class members wish to accept the settlement?[4]

A proper statement of the issue involved in objecting plaintiffs' Petition is:

> May class members, who have had and failed to take advantage of two separate and distinct opportunities to opt out of a class action properly certified under Rule 23 (b) (3), be permitted to opt out of the action merely because they are dissatisfied with the terms and conditions of a settlement which was approved by a majority of the class members and by the District Court?

The answer to the issue is clearly in the negative and, accordingly, objecting plaintiffs' writ should be dismissed as being without merit.

Conclusion

For the above-stated reasons it respectfully submitted that the Petition for Writ Of Certiorari To The United States Court of Appeals For The Third Circuit should be denied.

Respectfully submitted,

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---

[4] Petition, Page 9.

SEP 16 1974

MICHAEL RODAK, JR., C

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-64

MARIE ABATE, *et al.*,
Petitioners,

v.

PITTSBURGH PLATE GLASS COMPANY, *et al.*,
Respondents.

BRIEF OF PITTSBURGH PLATE GLASS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

Page

Question Presented 1

Statement of the Case 1

Summary of Argument 6

Argument 9

A. It Is Proper For A Fair And Adequate Settlement, Approved By The Court, To Bind All Class Members Who Have Not Previously Excluded Themselves From The Class In A Rule 23(b)(3) Action 9

B. There Is No Basis For Reversing The Court Of Appeals' Determination That The District Court's Approval Of The Settlement Was Not An Abuse Of Discretion . . . 20

Conclusion 27

TABLE OF CASES

Page

Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971) 26

Air Line Stewards and Stewardesses Assn., Local 550 v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973), *cert. denied*, ___U.S.___, 40 L.Ed.2d 773 (1974) 8, 16, 17, 18, 19, 20

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) 7, 13, 14

Bryan v. Pittsburgh Plate Glass Co., 59 F.R.D. 616 (W.D. Pa. 1973), *aff'd*, 494 F.2d 799 (3d Cir. 1974) 21

Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799 (3d Cir. 1974) 6, 15, 19, 23, 24, 25

City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) 20, 26, 27

Eisen v. Carlisle & Jacquelin, ___U.S.___, 42 U.S.L.W. 4804 (May 28, 1974) 16

Gilbert v. General Electric Co., 59 F.R.D. 267 (E.D. Va. 1973) 23

Hansberry v. Lee, 311 U.S. 32 (1940) 18, 19

Hecht v. Cooperative for American Relief Everywhere, Inc., 351 F. Supp. 305 (S.D. N.Y. 1972) ... 23

Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) 16

Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974) 16

Kober v. Westinghouse Electric Corp., 480 F.2d 240 (3d Cir. 1973) 24

Manning v. General Motors Corp., 466 F.2d 812 (6th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973) 24

Page

Mungin v. Florida East Coast Railway Co., 318 F. Supp. 720 (M.D. Fla. 1970), *aff'd per curiam*, 441 F.2d 728 (5th Cir. 1971), *cert. denied*, 404 U.S. 897 (1971) 27

Newman v. Stein, 464 F.2d 689 (2d Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972) 21, 26, 27

Protective Committee for Independent Stockholders of TMT Ferry, Inc. v. Anderson, 390 U.S. 414 (1968) 14, 15

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006, 1007 (1972) 22

Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) 24

Stevenson v. International Paper Co., 352 F. Supp. 230 (S.D. Ala. 1972) 24

United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co., 447 F.2d 647 (7th Cir. 1971) 20, 27

West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971) 20

STATUTES

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e, *et seq.* ... 1, 2, 23, 25

MISCELLANEOUS

Federal Rule of Civil Procedure 23, 28 U.S.C. Rule 23 ..... *passim*

Wright, "Class Actions," 47 F.R.D. 169 (1969) 12, 13

In the
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OCTOBER TERM, 1974

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BRIEF OF PITTSBURGH PLATE GLASS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit correctly held that the District Court did not abuse its discretion in approving the settlement of this class action?

STATEMENT OF THE CASE

Petitioners are members of a Plaintiff class who seek review of the Court of Appeals' affirmance of the District Court's approval of the settlement of this class action.

This class action was filed August 4, 1970, pursuant to Title VII of the Civil Rights Act of 1964[1] (hereinafter "Title VII") on behalf of a class of females who were former em-

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[1] Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §2000e, *et seq.*

ployees of Defendant Pittsburgh Plate Glass Company ("PPG") and members of Defendants United Glass and Ceramic Workers of North America and its Local No. 12 (collectively the "Unions").[2]

Plaintiffs alleged that Defendants had violated Title VII by (1) improperly failing to recall them to work on jobs at PPG's Creighton, Pennsylvania, plant and (2) improperly agreeing to terminate the seniority rights of employees who had been in continuous layoff status from the Creighton plant for a period of five consecutive years.[3] For these alleged violations the Complaint sought damages[4] and injunctive relief.[5]

The parties agreed that Defendants' current seniority and job classification systems are not violative of the law.[6] Thus, future compliance with the Act has not been an issue in this case.

After a period of discovery, on July 15, 1971, the District Court ordered that the class was to include the 452 female employees whose employment had been terminated on September 26, 1968, pursuant to the seniority agreement applicable to the Creighton plant of PPG.[7]

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[2]Complaint (I App. 1). The abbreviation "App." refers to the Appendix (Volume I, II or III) prepared by Petitioners for their appeal to the United States Court of Appeals for the Third Circuit, C.A. Docket No. 73-1697.

[3]Complaint (I App. 1-7), Pl. Pre-Trial Narrative (I App. 32a-33).

[4]Complaint (I App. 6-7).

[5]*Id.*

[6]Stipulations of Fact 16, 23 and 24 (II App. 27, 39).

[7]District Court Order of July 15, 1971 (I App. 14).

On July 26, 1972, the District Court entered a supplemental Order determining that the action be maintained under Federal Rule of Civil Procedure 23(b)(3)[8], as well as under Rule 23(b)(2), and directing that a notice be sent to the 452 class members pursuant to Rule 23(c)(2).[9]

The Rule 23(c)(2) notice was approved by the District Court, mailed on July 31, 1972, and explicitly advised the class members of (a) the date, time, and place of the trial and their right to appear at the trial; (b) the nature of the action; (c) the Court's determination that they were a member of the class; (d) the relief sought; (e) the representation of the class by the law firm of Balzarini, Walsh, Conway & Maurizi; (f) their right to retain independent counsel to represent their own interests; and (g) that they would be included in and bound by any judgment entered in the case unless they filed a written request for exclusion from the class by August 20, 1972.[10]

The Court ultimately found that the class consisted of 371 members.[11] No class member exercised her option to be represented by separate counsel.

The parties engaged in extensive pre-trial discovery, including interrogatories, depositions and requests for admissions.[12]

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[8]Federal Rule of Civil Procedure 23 is herein referred to as Rule 23.

[9]District Court Order of July 26, 1972 (I App. 15).

[10]I App. 17. Because the parties subsequently located 70 persons whose addresses were previously unknown and in order to assure that the notice actually reached the intended recipient, the parties on November 27, 1972, obtained permission from the District Court to remail a virtually identical notice to class members but this time by certified mail with a return receipt requested (I App. 46).

[11]District Court Finding of Fact (I App. 57).

[12]District Court Docket Entries (I App. i-v).

Trial began in October, 1972. Plaintiffs completed their case in chief. Defendant PPG obtained a delay in the presentation of the defense until one of its primary expert witnesses had sufficiently recovered from a sudden serious illness to testify. On December 21, 1972, PPG began the presentation of its defense. During the second day of PPG's defense, on December 22, 1972, counsel for the parties for the first time reached a tentative basis for settlement of the action. The trial was accordingly suspended so that the terms of settlement could be fully particularized.

Counsel for all parties reached final agreement as to the terms of settlement and all counsel recommended that settlement to the District Court on January 8, 1973.[13]

The settlement included a payment by PPG of more than $1,151,000. This payment included $931,724 to 370[14] members of the Plaintiff class, to be allocated among them on the basis of months worked for PPG; a guarantee of a pension to 76 class members who had accumulated at least 9 years 9 months of pension credits, and a payment of $17,500 to six active class members, to be divided among them on the basis of their respective activities and expenses incurred in forwarding the litigation. PPG also agreed to pay out-of-pocket expenses of $1,350 and counsel fees of $201,250 to the various lawyers who represented the class, out of which counsel are to reimburse any class member any amount advanced to meet legal expenses.[15]

On January 8, 1973, when counsel for all parties presented the settlement to the District Court, the Court set

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[13]II App. 168.

[14]One class member had died prior to the settlement.

[15]District Court Opinion and Order of June 12, 1973 (I App. 57).

January 29, 1973, as the date for a hearing on the fairness of the settlement and directed that a specified form of notice setting forth the terms of the settlement be sent to all class members.[16]

The notice fully described the precise amounts and benefits to be received by each class member and informed them that if the settlement were approved it would be binding upon all members of the Plaintiff class.[17] The notice also instructed any class members who wished to assert objections to the settlement to mail or deliver any such objections to the Clerk of Court and to appear at the hearing on January 29, 1973, to voice their objections.[18] Class members were informed that if they approved of the settlement they need not appear at the January 29 hearing.[19]

Some class members appeared at the January 29 hearing to state objections.

Counsel for the objectors (now the Petitioners) subsequently filed a brief with the District Court in support of the objections to the settlement. In that brief counsel stated that: "Objectors present but one question for this Court's consideration: Is the settlement proposed here fair and reasonable?"[20]

The Equal Employment Opportunity Commission (hereinafter the "EEOC") filed a brief *amicus curiae* with the District Court, which argued that each class member has a

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[16] I App. 49; District Court Order of January 8, 1973 (I App. 52-53).

[17] Notice of Proposed Settlement of Class Action (I App. 54-55).

[18] *Id.*

[19] *Id.*

[20] Objecting Class Members' Brief in Opposition to Proposed Settlement at 3. The same counsel who represented the objectors have remained as their counsel and filed the instant Petition.

right to continue his or her action, by opting out of the class, after a settlement has been consummated.[21]

On June 12, 1973, the District Court entered an Opinion and Order approving the settlement.[22]

In response to the appeal filed by the objecting class members, the Court of Appeals affirmed the District Court's exercise of discretion in approving the settlement as a fair and reasonable compromise and agreed that there was no basis for establishing subclasses or for allowing the objecting class members to "opt out" of the settlement.[23]

On August 3, 1974, the instant Petition was received by PPG. On August 10, 1974, in response to PPG's Application for Extension of Time in Which to File Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit, the Clerk of this Court extended the time within which this Brief must be filed to and including September 17, 1974.

SUMMARY OF ARGUMENT

The Court of Appeals properly held that where the terms of a settlement have been correctly determined to be fair and adequate, it is proper for a court approved settlement in a Rule 23(b) (3) action to bind all class members

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[21] Memorandum by the Equal Employment Opportunity Commission on the Right to Opt Out of a Proposed Settlement. Counsel for the objecting class members then filed what was labeled a Reply Brief of Objecting Class Members but which included an adoption of the EEOC's position that any individual class member can continue his or her own action by refusing to settle.

[22] 1 App. 57.

[23] *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir. 1974) which is also reprinted at 1a of the Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit (hereinafter the "Petition").

who have not previously excluded themselves from the class. Long in advance of the settlement of this action, the District Court had, in full compliance with Rule 23(c) (1), determined that the appropriate requisites of Rule 23(a) and (b) existed. Accordingly, the Court directed that Rule 23(c) (2) notices be sent advising class members of the fact that a Rule 23(b) (3) action had been determined to exist and of their right to request exclusion from the class. None of the Petitioners excluded themselves. It was only when Petitioners objected to settlement that they asserted any differences or disagreements with the rest of the class.

Rule 23(c) (2) provides that the judgment entered in a Rule 23(b) (3) action should include all members who had not excluded themselves pursuant to the Rule 23(c) (2) notice. The present Rule 23 was designed to avoid abuses which existed under the former rule, *i.e.*, that members of the potential class might await developments before being committed to class member status. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 547-49 (1974). Accordingly, under the present Rule 23, potential class members retain the option to participate in or withdraw from the class action only until their election pursuant to the Rule 23(c) (2) notice. *American Pipe & Construction Co., supra* at 549.

Sound policy considerations, as well as the language of Rule 23, militate against the alteration in Rule 23 proposed by Petitioners. If the concepts proposed by Petitioners were accepted many class actions would become impossible to settle because the defendant would not have the incentive of avoiding the expense and inconvenience of a long trial, which often is a weighty factor inducing settlement. Inevitably, some litigious class members will desire to continue the action to adjudication. Equally important, Rule 23 will be-

come unmanageable from the standpoint of efficient judicial administration since after a long period of action in concert, classes would tend to splinter into a myriad of smaller subclasses and individual claims.

Contrary to the assertion in the Petition at 21, the Seventh Circuit Court of Appeals' decision in *Air Line Stewards and Stewardesses Assn., Local 550 v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, ___ U.S. ___, 40 L. Ed.2d 773 (1974) does not conflict with the opinion of the Third Circuit Court of Appeals in the instant case. In the instant case, the District Court made an appropriate class determination pursuant to a consideration of the requisites in Rule 23(a) and (b). In the instant case, the District Court had provided class members with an opportunity to "opt out" of the class, as Rule 23(c)(2) requires in a Rule 23(b)(3) action. In the instant case there were no differences in the characteristics of, or the causes of action asserted by, class members. In all of the above respects, the instant action differs from the *Stewards* decision.

Petitioners' argument, that the Court of Appeals should be reversed because the settlement is not sufficiently substantial, lacks any foundation. The settlement included a total payment of more than $1,151,000 by PPG covering payments to 370 class members, counsel fees and expenses. In evaluating the basis of the District Court's determination that the settlement was a fair and adequate compromise, the Court of Appeals correctly recognized that the District Court must not turn the settlement hearing into a trial or rehearsal of trial, because the very purpose of compromise is to avoid the trial and resolution of disputed issues. The Court of Appeals correctly noted that Petitioners had failed to substantiate their claims of a large potential monetary recovery even if no defenses to liability were found to exist.

The Court of Appeals also correctly determined that partial and total defenses to liability might exist in the instant case. For example, many, if not all, of the claims for alleged lost wages might be barred by the appropriate statute of limitations. In addition, since the job classification system and seniority cut-off agreement were established through a conciliation agreement with the EEOC, which recognized that the classification system was pursuant to bona fide occupational qualifications, the District Court might properly have determined, if trial had been completed, that no back-pay be awarded. Further, the seniority cut-off agreement has been applied to both men and women and was prompted by a legitimate business need to eliminate massive layoff lists of persons who had not been employed for great numbers of years.

The Court of Appeals, after reviewing all of these factors, correctly determined that the District Court had not abused its discretion in approving the terms of the settlement. Further, whether or not the District Court abused its discretion obviously turns upon the particular facts of this case. This Court's reconsideration of that question will affect few others than the instant litigants. PPG submits that this question is not appropriate for the grant of a writ of certiorari.

ARGUMENT

A. It Is Proper For A Fair And Adequate Settlement, Approved By The Court, To Bind All Class Members Who Have Not Previously Excluded Themselves From The Class In A Rule 23(b)(3) Action.

Petitioners seek to persuade this Court to depart from the well-settled rule, which has been universally applied, that Rule 23 permits the settlement of class actions to bind all

class members who have elected to participate in the action rather than to "opt-out" of the class pursuant to the Rule 23(c) (2) notice.

Petitioners suggestion (Petition at 18) that the District Court failed to comply with Rule 23, in approving the settlement of claims of all class members, is not well founded.

In this case the District Court fully complied with all procedures specified in Rule 23.

After a period of initial discovery the District Court held that this was a proper class action.[24] In so holding the Court found pursuant to Rule 23(a) that the class was so numerous as to make joinder impractical; that there were questions of law and fact common to the class; that the claims of the three named Plaintiffs who were the representative parties, were typical of the claims of the class as a whole; and that the representative parties would fairly and adequately protect the interests of the class.[25]

The District Court held that this was a proper action under Rule 23(b) (2) because PPG's actions were generally applicable to the whole class.[26] The Court also subsequently determined that the action had additional characteristics which made it maintainable under Rule 23(b) (3), as well.[27]

Accordingly, the Court directed that Rule 23(c) (2) notices be mailed to class members.[28] It is especially important that these notices explicitly stated, *inter alia*, that, unless class members exercised their election to request exclusion from the class within 20 days from the date of the notice,

[24]District Court Order of July 15, 1971 (I App. 14.).

[25]*Id.*

[26]*Id.*

[27]District Court Order of July 26, 1972 (I App. 15).

[28]The content of the notices is fully discussed *supra* at 3.

they would be included in the class and bound by any judgment entered in the case.[29]

Five months later, after extensive discovery proceedings and several days of trial, a basis of settlement was reached among counsel for all parties and proposed to the Court.[30] Pursuant to Rule 23(e) the Court directed a complete notice of the terms of the proposed settlement to the class members.[31]

The Court assured that any objectors who wished to testify were given a full opportunity to be heard on any and all objections they had to the settlement and that counsel for objectors would have adequate time to file briefs.[32]

On June 12, 1973, pursuant to Rule 23(e) the Court approved the settlement.[33]

Petitioners argue (Petition at 18) that the District Court erred in entering a judgment which disposed of their claims. Petitioners contend that, regardless of whether the settlement was fair, each individual class member has the right to continue her own action if she does not like the amount and terms of the settlement.

The concept proposed by Petitioners is inconsistent with the purposes of Rule 23. The findings of numerosity of class members, common questions of law and fact, typicality of the claims of the class representatives, and the adequacy of the class representatives, which are required by Rule 23 and

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[29]*Id.*

[30]The facts relating to the settlement negotiations and terms are discussed *supra* at 4.

[31]The facts relating to the settlement notice are fully discussed *supra* at 5.

[32]See discussion *supra* at 5.

[33]District Court Order of June 12, 1973 (I App. 57).

which were made in the instant case, clearly contemplate common treatment of class members.

The proper recourse of an objector to a class action settlement is appeal of the settlement in its entirety and not the "opting-out" of the settlement by individual class members. Rule 23(c)(2) states:

> "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that: (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

Rule 23(c)(3) states:

> "The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class."

The Judgment in the instant case properly included all those who had not excluded themselves at the time of the class election that was made in response to the notice that had been sent pursuant to Rule 23(c)(2).

In this regard Professor Charles Wright has written:

> "Critical to the entire operation of the revised rule is the effect of the judgment. It is clearly contemplated

that every judgment in every class action will bind all of the members of the class, except for those who have asked to be excluded in a (b)(3) action."[34]

This Court recently explained the proper operation of Rule 23 in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974):

> "A recurrent source of *abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial* or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment. This situation – the potential for so-called 'one-way intervention' – aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one. The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to *assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.*
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> Under the present Rule, a determination whether an action shall be maintained as a class action is made by the court '[a]s soon as practicable after the commencement of an action brought as a class action. . .' Rule 23 (c)(1). Once it is determined that the action may be maintained as a class action under subdivision (b)(3), the court is mandated to direct to members of the class 'the best notice practicable under the circumstances' advising them that they may be excluded from the class if they so request, that they will be bound by the judgment, whether favorable or not if they do not

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[34] Wright, "Class Actions," 47 F.R.D. 169, 181 (1969).

> request exclusion, and that a member who does not request exclusion may enter an appearance in the case. Rule 23 (c) (2). Finally, the present Rule provides that in Rule 23 (b) (3) actions the judgment shall include all those found to be members of the class who have received notice and who have not requested exclusion. Rule 23 (c) (3). *Thus, potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation 'as soon as practicable after the commencement' of the action when the suit is allowed to continue as a class action* and they are sent notice of their inclusion within the confines of the class. Thereafter they are either non-parties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse." (Footnotes Omitted; Emphasis Supplied) 414 U.S. at 547-49.

The Petitioners were given the opportunity to exclude themselves from the class when they received the notice required by Rule 23(c) (2). As noted in *American Pipe & Construction Co. v. Utah, supra*, having elected to participate, Petitioners are full members of the class who must be bound by a fair and reasonable settlement approved by the District Court. Despite Petitioners' assertions, this Court's opinion in *Protective Committee for Independent Stockholders of TMT Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968) is not to the contrary.[35]

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[35]Petition at 19-20 suggests that *Protective Committee v. Anderson, supra*, prohibits a court from settling individual claims of class members. Petitioners' citation to *Protective Committee v. Anderson* is inapposite. That case involved court approval of a corporate reorganization under the Bankruptcy Act. The district court had approved a plan of reorganization upon the recommendation of Anderson who was the trustee but who was also to be the president of the newly reorganized company. The reorganization recommended by Anderson included the nearly full satisfaction of certain mortgage holders–men who had been in a "controlling" relationship to the corporation–at the expense of the shareholders, despite the fact that Anderson had filed an earlier report stating his opinion

(continued)

Sound policy considerations, as well as the language of Rule 23, also militate against the alteration in Rule 23 proposed by the Petitioners.

A procedure which allows exclusion at this stage would reduce settlement possibilities in class actions. To permit class members a second opportunity to "opt-out" of the class, after a settlement has been concluded, in nearly every case would remove one of the most significant incentives for defendants to make a settlement–the avoidance of the costs of protracted litigation. These litigation costs–including counsel fees, expert witness fees and lost time of employees who assist in the case–are often an overwhelming incentive to settlement, particularly in a class action. Indeed, the procedure suggested by Petitioners would encourage class members to "opt-out" of the settlement in hope of extracting a tribute or premium from the party opposing the class.

Further, the concept proposed by the Petitioners could vastly multiply the number of class actions which the federal courts would be required to handle. One class action, such as the present case, might splinter into a number of subclasses.

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that the mortgage was a fraudulent conveyance and also that the mortgage holders had otherwise diverted corporate opportunities. Neither the district court nor Anderson explained his reversal of field on the validity of the mortgage or why the claims of the mortgage holders should be recognized. *Protective Committee v. Anderson, supra* at 426-27, 433-34. It was in that context that this Court determined that the district court's approval of the plan of reorganization was not adequately explained. In contrast, in the instant appeal there is no suggestion of fraud or collusion. The District Court's Opinion and Order in the instant case indicates that significant and legitimate legal defenses exist regarding whether any liability existed and that accordingly a compromise between Plaintiffs and Defendants was proper (I App. 57). The Court of Appeals in the instant case properly determined that the District Court had not violated the holdings in *Protective Committee v. Anderson, Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, at 804.

It is conceivable, with the publicity that attends a large monetary settlement offer, that numerous attorneys representing groups or individual class members would appear and the action may be effectively converted into the trial of many separate cases or, alternatively, settlement negotiations with various attorneys regarding many separate cases. Further, Petitioners' concept is not limited to a one time splintering of the class. If the Petitioners' concept were accepted, the instant case might splinter into one additional class with 80 class members at the present time but later splinter into any number of other subclasses should the bulk, but not all, of this first splintering class decide at some subsequent date to settle.

Finally, there is no conflict in the Circuits. The Petitioners have cited, and PPG has found, no case which has accepted the unique principle urged upon this Court.[36] The numerous appellate decisions, cited *infra* at 20, setting forth the standards for appellate review of settlements approved by lower courts, demonstrate that appeal is the proper recourse of dissenting class members.

The Petition at 21 states that *Air Line Stewards and Stewardesses Assn., Local 550 v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, ____U.S. ____, 40 L.Ed.2d 773 (1974) conflicts with the Opinion of the Court of Appeals for the Third Circuit in this case. An examination of the facts of the *Stewards* case shows that the decisions are not in conflict.

[36]The citations in Petition at 20 to the case of *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) and Petition at 21 to *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969) are inapplicable. Neither of those cases in any way involved a class action settlement. Further, the citation in Petition at 21 to *Eisen v. Carlisle & Jacquelin*, ___U.S. ___, 42 U.S.L.W. 4804 (May 28, 1974) is inapposite. PPG can find nothing in *Eisen* which countermands any of the procedures followed by the District Court in the instant case.

In *Stewards* the Court of Appeals for the Seventh Circuit disapproved a settlement of a Rule 23(b)(3) action where members of the plaintiff class had *never* received an "opt-out" opportunity pursuant to a Rule 23(c)(2) notice, and where the settlement had been negotiated by an attorney and the representative plaintiff union who were acting in a clear conflict of interest situation.

In *Stewards* the district court had made no determination as to whether a proper class action existed until after the settlement had been proposed. Even when that determination was made the *Stewards* district court did not address the prerequisites of Rule 23(a) or of any additional requirements in Rule 23(b).[37] The district court in that case incorrectly ignored the Rule 23(b)(3) character of the case and did not provide notice pursuant to Rule 23(c)(2). Therefore, as the Seventh Circuit noted, although the Rule 23(b)(3) character of the action was obvious, no member of that plaintiff class had been given an opportunity to "opt-out" as required by Rule 23(c)(2).[38]

Further, in *Stewards* counsel for the plaintiff union purported to act as counsel for the plaintiff class. He conducted the litigation and negotiated the settlement without consulting any member of the class concerning the terms of the settlement.[39] Counsel for plaintiff class admitted that the plaintiff union had made the decision to agree to the settlement.[40] Counsel for plaintiff class also admitted that both he and the union were attempting to act for two distinct groups of class members with conflicting and adverse interests.[41] One group consisted of stewardesses who were

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[37] *Stewards*, 490 F.2d 636, at 638.

[38] *Id.* at 643.

[39] *Id.* at 638.

[40] *Id.* at 640.

[41] *Id.*

then currently employed and whose principal interest was obtaining a change in the airlines' policy of terminating stewardesses who became pregnant. The other group consisted of former stewardesses whose claims included back pay, reinstatement, accumulated seniority and a change in the pregnancy policy. The Seventh Circuit noted the conflict between the interests of these two groups.[42] The Court required that a representative of the class of former stewardesses be permitted to replace the union as class representative and directed that a Rule 23(c)(2) notice be sent to all class members to provide an opportunity for each of them to exclude herself from the action or appear through her own counsel.[43] Citing *Hansberry v. Lee*, 311 U.S. 32 (1940), the Seventh Circuit noted that the persons in control of the union were the currently employed stewardesses, who were not even members of the class as it was redefined at the time of settlement.[44]

In distinction from *Stewards*, in the instant case the determination as to the maintenance of this action as a class action, its designation as a Rule 23(b)(3) class action, and the mailing of the required Rule 23(c)(2) notice giving all members of the class an opportunity to "opt-out" of the action occurred long before even a tentative basis of settlement existed. All provisions of Rule 23 were followed to the letter. All class members had been fully advised as to the nature of the action and the identity of the class representatives at the time of the Rule 23(c)(2) notice and class membership election. The Petitioners had rejected that opportunity to be excluded and rejected the opportunity to be represented by separate counsel.

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[42] *Id.* at 640.

[43] *Id.* at 643-644.

[44] *Id.* at 640.

Unlike *Stewards*, there is no distinction or conflict between the causes of action asserted by Petitioners and the causes of action asserted by the non-objecting members of the class. The logic of *Hamberry v. Lee*, supra, cited by the Seventh Circuit and by the instant Petition at 20, is not applicable to the instant facts. As the Court of Appeals correctly noted, "All class members are former PPG employees terminated at the same time for the same reason by the same action. No difference among the plaintiffs appeared until some objected to the settlement, and we cannot assume that objection to the settlement sprang from differences generic to one identifiable group of plaintiffs."[45] The Petitioners have pointed to no differences in the characteristics of the Petitioners compared to the non-objecting class members. Respondent is aware of no such differences. None appear as of record. The Petitioners had an average of 74.3 months service per person on the date of their termination; the class as a whole had an average of 77.1 months each.[46] In addition, class members in both the objecting and non-objecting categories had dates of hire ranging from 1943 to 1951 and dates of layoff ranging from 1951 to 1958.[47] Further, the District Court made findings regarding "common questions," the typicality of the claims of the plaintiffs, that the representative parties would fairly and adequately protect the interests of the class, and that the Company's actions were generally applicable to the class.[48]

In summary, unlike *Stewards* the requisites of Rule 23 were followed by the District Court; unlike *Stewards* all class

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[45] *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, at 804.

[46] These averages are compiled from data contained in Appendix A to Order of Court of June 12, 1973 (I App. 57).

[47] Def. PPG Ex. 8 (II App. 162-63).

[48] Order of July 15, 1971 (I App. 14).

members were given an opportunity to "opt-out" before settlement was reached; and unlike *Stewards* there were no conflicts between the claims of members of the class. Contrary to the assertions of the Petitioners there is no conflict between the decision in the *Stewards* case and the decision of the Court of Appeals below.

The Court of Appeals correctly determined that it was proper for the instant settlement to bind all members of the Plaintiff class.

B. There Is No Basis For Reversing The Court Of Appeals' Determination That The District Court's Approval Of The Settlement Was Not An Abuse Of Discretion.

The Petitioners suggest (Petition at 9) that the District Court erred in approving the settlement because the settlement was not sufficiently substantial. The standard of review applicable to this question is whether the District Court abused its discretion in approving the settlement. *City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 454 (2d Cir. 1974); *United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co.*, 447 F.2d 647, 655 (7th Cir. 1971); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971).

Whether or not the District Court abused its discretion obviously turns upon the particular facts of this case. This Court's reconsideration of that question will affect few others than the instant litigants. PPG submits that this question is not appropriate for the grant of a writ of certiorari. In any event, the Court of Appeals in this case correctly determined that there was no abuse of discretion.

The settlement included a total payment of more than $1,151,000 by PPG covering payments to 370 class members, counsel fees and expenses.

At the time of approval of the settlement the District Court had available for its consideration substantial evidence as a result of extensive pre-trial discovery, pre-trial conferences, disposition of preliminary motions, oral arguments and written briefs, as well as exhibits and testimony introduced at trial. Plaintiffs' case in chief had been completed and Defendants' case had begun presentation when the suit was settled.

In evaluating the basis of the District Court's determination that the settlement was a fair and adequate compromise, the Court of Appeals correctly recognized that the District Court must not turn the settlement hearing into a trial or a rehearsal of trial, because the very purpose of a compromise is to avoid the trial and resolution of disputed issues. *Newman v. Stein*, 464 F.2d 689, 692 (2d Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972).

This is an extremely complex case, the factual development of which extends over more than 40 years, and involves many difficult legal and factual issues. After reviewing the massive evidentary materials available and the arguments presented by all parties, the District Court concluded that this case involved many complex issues which made "liability questionable and subject to conjecture." [49]

The probability is substantial that, had the case been tried to conclusion, PPG could have presented a complete defense to liability or, had a violation been found to have existed, that a monetary award to Plaintiffs would have been found unwarranted or very limited in amount.

For example, the evidence at trial proved that the seniority cutoff agreement, toward which Petitioners have directed much of their fire, was, when viewed from the per-

[49] *Bryen v. Pittsburgh Plate Glass Co.*, 59 F.R.D. 616, 617 (W.D. Pa. 1973), *aff'd*, 494 F.2d 799 (3d Cir. 1974).

spective of its total impact upon the work force, a completely non-discriminatory agreement which ultimately will probably adversely affect more men than women. [50]

Moreover, the seniority cutoff was entered into for sound business reasons [51] completely unrelated to the sex of the employees ultimately affected by it. The cases hold that an agreement will not be held to violate Title VII if it was entered into as a matter of business necessity. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006, 1007 (1972).

A substantial defense also exists that the Plaintiffs' claims are severely limited and perhaps barred by the applicable statute of limitations.

Petitioners claim that the Plaintiffs in the action should have been recalled from layoffs at periods since July 2, 1965 (the effective date of Title VII) and accordingly suffered the loss of wages from failure to recall.[52]

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[50] The testimony at trial and the agreement on its face clearly indicate that the agreement applies even-handedly to both men and women. [II App. 158 and Pl. Ex. 22 (II App. 6)]. Although the initial impact of the agreement affected only members of the Plaintiff class, the agreement was intended to, and has since resulted in, the termination of men who are laid off for more than five years. By December, 1972, the agreement had terminated the seniority of 24 men. Def. PPG's Answer to Pl. Interrogatory 1, App. A–Pl. Ex. 19a (II App. 14). As of August 7, 1974, 90 male employees had been terminated under the agreement.

[51] The decreasing level of employment at Creighton plant (from 4,200 in 1952 to 800 in 1972) had created a massive layoff list, which included both men and women, and which seriously interfered with the ability of the Creighton plant to operate competitively. (II App. 105, 111, 120, 122-23). The testimony at trial established that a seniority cutoff agreement was essential to Creighton plant because the massive layoff list effectively prevented the infusion of new workers into the plant (II App. 122-23).

[52] Petition at 10.

However, there is no evidence that a single vacancy existed, that a new employee was hired or that any employee was recalled from layoff subsequent to June of 1968. The first class member to file charges waited until late November 1968.[53] Title VII of the Civil Rights Act, as it applied at all times revelant to this suit, required an aggrieved person to file a charge with the EEOC within 90 days after an alleged unlawful employment practice occurred (42 U.S.C. § 2000 e-5(d)). The probability is high that all of Plaintiffs' claims, to the extent that they involve allegations of discriminatory failure to recall from layoff, are barred by the applicable period of limitations. Recent decisions have indicated that the appropriate class of Plaintiffs should not even include persons who were not injured by the alleged unlawful act within the statute of limitations period applicable to the filing of charges with the EEOC.[54] Accordingly, it was not error for the Third Circuit to indicate that the Plaintiffs in the instant case may have been barred from asserting the claims of discriminatory layoff and failure to recall upon which Petitioners base their allegations of large potential monetary recovery.[55]

In addition, even if the Plaintiffs were to prevail on the issues of liability, there is a strong possibility that the result-

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[53] Pl. Exs. 102-104 (II App. 46).

[54] In *Hecht v. Cooperative for American Relief Everywhere, Inc.*, 351 F. Supp. 305 (S.D. N.Y. 1972) the court used the applicable statute of limitations [there 210 days pursuant to the 1972 amendments] to exclude purported class members because their discharges occurred outside of the limitations period prior to the filing of the charge. *Gilbert v. General Electric Company*, 59 F.R.D. 267 (E.D. Va. 1973) held that the appropriate scope of the class was limited to females who were employed on or after a date measured 90 days prior to the earliest date of filing of charges with the EEOC by a class representative.

[55] *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, at 802.

ing award would not be as substantial as the benefits conferred by this settlement. The statute clearly leaves the award or denial of back pay to the discretion of the District Court, to be exercised in the light of the circumstances of each case. *Kober v. Westinghouse Electric Corp.*, 480 F.2d 240, 248 (3d Cir. 1973).

In the instant case a refusal to grant backpay would be appropriate. Defendants maintained the Creighton plant job classifications and entered into the seniority cutoff in good faith compliance with the terms of an EEOC conciliation agreement.[56] To penalize such compliance by a back pay award, upon an *ex post facto* determination that the terms of the conciliation agreement were unlawful, would be unfair.[57] The Third Circuit correctly noted that upon the facts of this case, the District Court might properly have determined, if trial had been completed, that no backpay be awarded.[58]

Finally, the Petitioners urge that the settlement is unfair because it is not sufficiently substantial and does not include all forms of relief they feel they would receive if they were successful in a litigation to the finish.[59]

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[56]Def. PPG Ex. 7 at 4a (II App. 149-51) and Def. PPG Ex. 5 (II App. 132, 136).

[57]Numerous cases have refused to impose backpay liability upon defendants who acted in good faith in accordance with the terms of agreements with the Office of Federal Contract Compliance (the fair employment agency covering government contractors) or with EEOC guidelines on state protective legislation. *Kober v. Westinghouse Electric Corporation*, 480 F.2d 240, 248 (3d Cir. 1973); *Manning v. General Motors Corp.*, 466 F.2d 812 (6th Cir.1972), *cert. denied*, 410 U.S. 946 (1973); *Rosenfeld v. Southern Pacific Company*, 444 F.2d 1219 (9th Cir. 1971); and *Stevenson v. International Paper Company*, 352 F.Supp 230 (S.D. Ala. 1972).

[58]*Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, at 802.

[59]Petition at 10.

Petitioners claim that the class members lost six years of pay but offer no evidence to support that claim.[60]

The only evidence cited by the Petitioners is the data in Petition at 10. There Petitioners note that 380 men were hired in the period since the effective date of Title VII. Two hundred ninety-four of those men were hired in 1966, 82 men were hired in 1967, and 4 men were hired in 1968.[61] It should be remembered that there were 452 women in the potential class as determined by the Order of July 15, 1971.[62] Therefore, even if none of the men had been hired and only the women on layoff had been employed to perform heavy laboring jobs, not all of them would have been offered work.[63] Moreover, virtually all of the newly hired men worked only for a brief period, usually one or two years.[64] Finally, the period when these men were hired and worked was outside of the applicable statute of limitations period.[65] The Third Circuit correctly noted that Plaintiffs have failed to substantiate their claims of large potential monetary recovery.[66]

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[60]*Id.* The Petitioners quote (Petition at 11-12) from certain trial testimony of one of the most senior class members who assumed without any supporting evidence that *she* had lost seven years back wages. That class member subsequently agreed to the settlement and is not one of the present objectors.

[61]Stipulations of Fact 37, 38 and 39 (II App. 101-3).

[62]I App. 14.

[63]Furthermore, the "labor" jobs into which the men were recalled involved both stamina and physical strength probably beyond that of women of the age of Plaintiff class in 1966-68. Even if the members of the Plaintiff class had been recalled, they would have had to demonstrate that they were physically capable of performing the jobs in question.

[64]Stipulations of Fact 37, 38 and 39 (IIApp. 101-03).

[65]See discussion *supra* at 22-23.

[66]*Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, at 802.

Of course any claims by the Petitioners that they would have received pension credits, if they had worked, bear the same defects as their claims for back wages. In addition, the claims for reinstatement are illusory because of the declining work force at Creighton.[67]

Further, the fact that a proposed settlement is less than the recovery which might result from a successful litigation does not mean that the proposed settlement should be disapproved.[68] This is particularly applicable in the context of the present case where the District Court has determined that there is substantial uncertainty as to whether liability could be established.

Appellate decisions reviewing class action settlements have reiterated several recurring principles applicable to the review of class action settlements: (1) compromise is favored as an efficient device for lessening the burden on the courts; (2) by its nature, a settlement represents a compromise between the parties and should not be expected to afford to class members every goal they might achieve through a complete victory after full litigation; and (3) the court is the guardian of non-objecting class members and should reject

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[67]The work force at Creighton in December, 1972 was 800 persons. (II App. 111). The prospects for a significant increase in employment are not good. (II App. 114). Even assuming that women the age of the Plaintiff class could perform all of the jobs in the plant, many of which are heavy and strenuous and are performed under very hot working conditions, the prospect of the re-employment of the 370 class members is not good.

[68]*City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974); *Newman v. Stein*, 464 F.2d 689 (2d Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972); *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971).

the contentions of objectors if the immediate benefits of the settlement outweigh the possible rewards of full litigation.[69]

In accordance with those principles, the Court of Appeals found that the District Court's approval of the settlement of this action was not an abuse of discretion.

This Court should not grant a writ of certiorari to undertake a second appellate review of the District Court's approval.

CONCLUSION

For all of the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[69] *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974); *Newman v. Stein*, 464 F.2d 689 (2d Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972); *United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co.*, 447 F.2d 647 (7th Cir. 1971); *Mungin v. Florida East Coast Railway Co.*, 318 F.Supp. 720 (M.D. Fla. 1970), *aff'd per curiam*, 441 F.2d 728 (5th Cir. 1971), *cert. denied*, 404 U.S. 897 (1971).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-64

MARIE ABATE, *et al.*,

Petitioners,

v.

PITTSBURGH PLATE GLASS COMPANY, *et al.*,

Respondents.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully request rehearing on Petition For Writ Of Certiorari in this case pursuant to Rule 58, 2; and in support thereof state as follows:

That Defendants-Respondents, Pittsburgh Plate Glass Industries (hereinafter referred to as P.P.G. Industries); the United Glass and Ceramics Workers of North America AFL-CIO, and the United Glass and Ceramics Workers of North America, Creighton Local 12; have

been in violation of the Civil Rights Act of 1964 (Title VII) through age discrimination in addition to sex discrimination. As plaintiffs approached age when pension time would have been gained by working, defendants P.P.G. Industries, and the unions, unlawfully arranged a seniority termination cut-off on August 14, 1968 (notice of which was mailed to women September 26, 1968) with no further recall rights, all this three years *after* the law went into effect.

Was the lower court action abusive of it's discretion by

1. Imposing a "compromising settlement" on women who were excluded from at least 20 to 40 hearings and countless secretive meetings; which original counsel, the committee and their husbands (*husbands not parties in interest*, sat in on and participated in decisions) which resulted in a meager, inadequate, token financial settlement.

2. Instead of being recalled in 1966 which would have enabled plaintiffs to earn 50 to 62 thousand dollars each plus additional benefits and pension rights; the settlement was based on $32.66 per month worked; ranging from a grand total of $32.66 (representing for an individual, time lost of approximately seven years.) to a "high" of less than $6,000. in disbursements which the defendants and lower court consider "fair and adequate."

This shows less than 3% of relief sought and constitutes a grave injustice to plaintiffs. What existing relationship is there between time women had worked prior to the discrimination, and losses they sustained as a result of the discrimination? No rationale exists for this.

3. The trial judge exerted much undue pressure and harrassment on plaintiffs desiring to become a separate class, in order to seek a fair and just settlement.

The terms of the settlement were repeatedly denied to petitioners until approximately four months after the opt out date.

Deceptive information released by the committee many months prior to that time was that women would individually receive 50,000.00 dollars each.

Are balances of scales tipped in favor of big corporations; while laws protecting citizen rights are postdated, then ruled ineffective? Petitioners pray US Supreme Court will permit dissatisfied members to seek adequate relief and will grant us a rehearing on Petition For Writ Of Certiorari.

Equal Employment Opportunity Commission findings were continually distorted by lower court and defendants; and subtle, behind the scenes restraints appeared to be placed upon them in that court.

This petition is restricted to grounds above mentioned: and is presented in good faith and not for delay.

This is to certify that on or before the 9th. day of January, 1975 copies of this application are being sent to:

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Respectfully submitted by one of the Petitioners this 18th. day of December, 1974.

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